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No. 91-577

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BONITA PASCHAL, DANIEL DODSON, PAUL BUCASAS and all others similarly situated,

Petitioners,

v.

LOLETA DIDRICKSON, the Director of the Illinois Department of Employment Security; STELLA CUTHBERT, the Commissioner of the Illinois Department of Employment Security; LYNN MARTIN, the Secretary of the United States Department of Labor; ROBERTS T. JONES, the Assistant Secretary for the Employment and Training Division of the United States Department of Labor; and the UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX VOLUME I TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-3301
BONITA PASCHAL, et al.,

Plaintiffs-Appellants

v.

SALLY JACKSON, Director of the Illinois Department of Employment Security, et al.,

Defendants-Appellees.

Appeal from the
United States District Court for the
Northern District of Illinois,
Eastern Division.
No. 83 C 3166--**Frank H. Easterbrook**,
District Judge pursuant to
General Rule 2.30E.

ARGUED MAY 10, 1991--DECIDED JULY 9, 1991

Before BAUER, *Chief Judge*. Posner, and Ripple, *Circuit Judges*.

BAUER, *Chief Judge*. In a second appeal of this case, we are asked to determine whether the State of Illinois' sovereign

immunity bars an award of benefits to two classes of unemployment insurance claimants. Pursuant to 42 U.S.C. § 1983, the claimants challenged the method by which the Illinois Department of Employment Security ("IDES") administered two unemployment insurance programs: the extended benefits ("EB") program, which pays benefits during periods of sufficiently high unemployment to claimants who have exhausted their regular benefits (which last up to twenty-six weeks), and the federal supplemental compensation ("FSC") program, which paid benefits during the recession in the early 1980s to otherwise eligible unemployment insurance claimants who had exhausted their regular benefits and any extended benefits.

In the first appeal, we held that the claimants had proven at trial two due process violations. *Cosby v. Ward*, 843 F.2d 967 (7th Cir. 1988). They established that IDES had

failed to give claimants adequate notice of their work search responsibilities and had failed to provide claimants with notice of the issues to be determined at claims adjudicators' interviews and referees' hearings. *Id.* at 985-86. Because the district court terminated the trial after the claimants had presented their case and before the defendants had a chance to offer a case in rebuttal, we remanded the matter back to the district court for another proceeding.

There never was a second trial, however, because the parties entered into a partial settlement. We call the settlement "partial" because it affected only the EB claimants and provided only for prospective relief. Also, the relief was contingent because the EB program is available only when triggered by adverse economic conditions. The settlement provided no relief whatsoever for the FSC claimants because FSC benefits were distribut-

ed pursuant to a temporary program that since has ended. The partial settlement agreement contained one more provision as well: the parties agreed to litigate any questions concerning the remaining claims for retroactive relief. Acting on that provision, the IDES moved to dismiss the retroactive claims on the ground that the eleventh amendment to the United States Constitution deprives a federal court of jurisdiction to award retroactive relief. The district court agreed, and entered a final judgment approving the consent decree and dismissing the retroactive claims. *Cosby v. Jackson*, 741 F. Supp. 740, 743 (N.D. Ill. 1990). From that judgment, the claimants brought a timely appeal.

The eleventh amendment provides that an unconsenting state is immune from lawsuits brought in federal court by it own citizens as well as by citizens of other states. *See Hans v. Louisiana*, 134 U.S. 1 (1890). Ever

since *Ex parte Young*, 209 U.S. 123 (1908), however, it has been recognized that the eleventh amendment does not prevent a federal court from directing state officials to bring their conduct into conformity with federal law. We have that very situation here. We affirmed the judgment of the district court that certain practices of IDES were held to violate the Due Process Clause of the fourteenth amendment and the "fair hearing clause" of Title III of the Social Security Act, 42 U.S.C. § 503(a)(3). Although the eleventh amendment does not prohibit a federal court from finding liability when state officials' acts are *ultra vires*, it bars a judgment awarding retroactive damages that must come directly from the general revenues of the state. *Edelman v. Jordan*, 415 U.S. 651, 663, 668 (1974). The question we are asked to resolve is whether the accrued unemployment

compensation benefits sought here will have to be paid out of these types of funds.

Before we proceed, we must take some time to consider the workings of the Unemployment Trust Fund scheme. Unemployment insurance was born of the economic ills of the Great Depression. *See generally* Bernstein and Ramel, *The Illinois Unemployment Insurance Act*, 42 Ill. Ann. Stat. XIII (Smith-Hurd 1986). From the beginning, unemployment compensation was conceived as a joint effort among the states and the federal government. The Social Security Act, 42 U.S.C. §§ 301-12007 (1935), contained two provisions that were designed to induce the states to pass unemployment compensation laws. Title III of the Social Security Act provided that approved state unemployment compensation schemes would be financed entirely with federal funds. Title IX assigned a uniform national payroll tax on employers for contri-

butions paid to federally approved state unemployment compensation programs. Employers who pay contributions to a state unemployment insurance program that complies with federal law are entitled to a credit against their federal unemployment tax. 26 U.S.C.A. §§ 3301-3300 (1987). The federal government has imposed certain requirements upon the states primarily to protect funds, but the states have had "wide latitude" to administer their own programs. Bernstein and Ramel, 42 Ill. Ann. Stat. at XIX.

In Illinois, as in other states, the basic operation mechanism of the unemployment compensation program is quite simple: the contributions from liable employers are collected and then distributed to eligible recipients. There are, however, more than a few intermediary steps. Pursuant to the State Unemployment Insurance Act, Ill. Rev. Stat. 1989, ch. 48, ¶¶ 300-820 ("Act"), the

Director of the Department of Employment Security, must deposit all monies payable under the Act in a "clearing account," one of three separate accounts maintained by the Director (the other two being the benefit and special administrative accounts). Ill. Rev. Stat. ch. 48, ¶ 660. The Act provides that "[m]oneys in the clearing, benefit and special administrative accounts shall not be commingled with other State funds." *Id.* After the funds in the "clearing account" clear, the Director must immediately deposit them with the United States Secretary of the Treasury to the credit of Illinois' account in the federal unemployment trust fund. *Id. See also* 42 U.S.C. §§ 503(a)(4) and 1104. The Director may draw upon the funds to pay benefits up to, but not exceeding, the amount in the State's account. *Id.* The monies payable under the Act are the "sole and

exclusive source for the payment of benefits." Ill. Rev. Stat. ch. 48, ¶ 790.

When the State needs funds to pay benefits, the necessary amounts are requisitioned from the federal unemployment trust fund and deposited into an unemployment fund called the "benefit account." *Id. See also* 42 U.S.C. § 1104(f); 26 U.S.C. § 3306(f). In addition to the payments to unemployed workers, the funds in the benefit account may be expended for "refunds of contributions, interest and penalties under the provisions of the Act, the payment of health insurance in accordance with [the Act], and the transfer of payment of funds to any Federal or State agency pursuant to reciprocal arrangements...." Ill. Rev. Stat. ch. 48, ¶ 660. If unclaimed or unpaid amounts remain in the benefit account after the period for which they were requisitioned, they must be used to pay benefits in succeeding periods or

redeposited in the State's account in the federal unemployment trust fund. *Id.*

Within the federal unemployment trust fund is an employment security administration account. Each fiscal year, funds are appropriated from the United States Treasury to the unemployment trust fund in an amount equal to the year's federal unemployment tax receipts. These funds then are credited to an employment security administration account. IDES can requisition money from this account to help cover administrative expenses. *Id.* *See also* 42 U.S.C. § 1101(c). If the federal employment security administration account has insufficient funds to defray IDES' administrative expenses, additional funds are available to IDES in its special administrative account, which is comprised of interest payments and penalties collected from employers who fail to make timely contributions. Ill. Rev. Stat. ch. 48, ¶¶ 661 & 663.

Should the federal unemployment trust cease to exist, Illinois' money would be transferred to the State Treasury for disposition at the behest of the Director in accordance with the Act. Ill. Rev. Stat. ch. 48, ¶ 662. If the State's account falls short, then the governor is authorized to apply to the United States Secretary of Labor for an advance to the State's account. Any federal money received by the State or the IDES Director "shall be received and held by the State Treasurer as ex-officio custodian thereof separate and apart from all other State moneys, and such funds shall be distributed or expended ... for the proper and efficient administration of the Act." *Id.* at 663.

The EB and FSC programs operate a bit differently. States were induced to pass the EB program pursuant to the Federal-State Extended Unemployment Compensation Act of

1970, 26 U.S.C. § 3304(a)(11). Unlike regular benefits, one half of EB payouts are reimbursed by the federal government. 26 U.S.C. § 204(a)(1)(A). Within the federal unemployment trust fund is an extended unemployment compensation account. Funds from the extended unemployment compensation account can be transferred to states to cover the federal government's share. *Id.* § 204(e). As with the regular benefits program, the federal government assists the states in meeting their administrative costs. *Id.* §§ 501, 502 & 1104(c)(1)(A)(i).

In the case of FSC, the benefits are paid out of the State's benefit account. Ill. Rev. Stat. ch. 48, ¶ 660. For each state that entered into an agreement to participate in the FSC program, the federal government reimbursed or advanced all of the funds paid out. *See* Federal Supplemental Compensation Act of 1982, 26 U.S.C. § 3304. The FSC Act

also authorizes funds to assist the states paying for the administrative costs of the program. *Id.* §§ 3304 & 604(c).

With this background in mind, we turn to the matters at issue in this case. The claimants argue that, because Illinois' unemployment compensation funds are held in separate accounts that may not be commingled with other State monies, payment of accrued claims from the fund is not barred by the eleventh amendment. According to this argument, the State can have no interest in immunity because it will not have to pay the relief the claimants seek. An award of EB would not affect the state treasury because half of it is reimbursed from the federal treasury and the other half from a segregated fund. As to FSC, the claimants argue that the whole award would be paid from federal funds. IDES is not responsible for any of the administrative costs associated with

paying out of either fund. The claimants further submit that, because the State's collections substitute for the federal unemployment insurance tax and the federal government holds the funds until the State needs them, the State merely acts as the federal government's agent for collecting and dispersing part of the revenues necessary to operate the unemployment insurance program.

This, in essence, is the "trust fund doctrine," which holds that the eleventh amendment does not bar recovery of funds segregated from general public funds. The claimants pin their hopes on *Miller-Davis v. Illinois State Toll Highway Authority*, 567 F.2d 323 (7th Cir. 1977), in their words, a "seminal" case that applied the trust fund doctrine to allow recovery of damages for alleged contract violations by the Illinois State Toll Highway Authority. We permitted such recovery after analyzing the financial

organization of the Highway Authority and determining that its funds were sufficiently segregated from the general public funds in the Illinois State Treasury, so that any judgment against the fund was not a judgment against the State. *Id.* at 327.

In addition to *Miller-Davis*, the claimants point out the admittedly ample authority that recognizes that a lawsuit is not against the sovereign when the relief has no impact upon the state itself. *See, e.g., Camacho v. Bowling*, 562 F. Supp. 1012 (N.D. Ill. 1983); *Kostelic v. Bernardi*, 538 F. Supp. 620, 622 (N.D. Ill. 1982); *Jenkins v. Bowling*, 80 C 928 (N.D. Ill. 1982), *aff'd in relevant part*, 691 F.2d 1225, 1235 (7th Cir. 1982). Among this authority is a body of case law that has allowed plaintiffs to sue a state in federal court for recovery of past unemployment claims on the ground that the state's unemployment compensation fund is sufficiently

segregated from the general revenue fund. *See, e.g., Brown v. Porcher*, 660 F.2d 1001, 1007 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983)1 *Brewer v. Cantrell*, 622 F. Supp. 1320, 1323 (W.D. Va. 1985), *aff'd*, 796 F.2d 472 (4th Cir. 1986); *Bowen v. Hackett*, 387 F. Supp. 1212 (D.R.I. 1975); *Bigelow v. Michigan Employment Security Comm'n*, [1975-79 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 21,520 (E.D. Mich. 1978); *Black v. Caldwell*, [1975-1979 Transfer Binder] Unemp. Ins. Rep. (CCH) ¶ 21,485 (N.D. Ga. 1976).

Well aware of this precedent, the district court instead cast its lot with the Tenth Circuit. In *Esparza v. Valdez*, 862 F.2d 788 (10th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989), a group of aliens who had been denied unemployment compensation sued for declaratory and injunctive relief seeking both prospective and retroactive relief for the wrongfully withheld benefits. The court of

appeals indicated that it had "great difficulty" with cases that have found the segregation of funds dispositive as to the issue of whether a claim for accrued benefits is barred by the eleventh amendment. The court stated that it did not believe that a state's sovereign immunity "can be abrogated through reliance on notions of whether such relief would be paid out of a general or special revenue fund." *Id.* at 794.

We, too, have great difficulty with the view that a state's structure is dispositive of whether one can sue the state for accrued benefits. Examining the source of funds once might have proven useful in identifying the real party in interest, but such an examination is of little consequence in determining whether damages should be paid. It is a complete waste of time to engage in the niceties of determining whether a particular department of a state is "of the United

States" for eleventh amendment purposes when the lawsuit is against the state and judgment will be entered against the state as an entity. We prefer an approach that disregards the source of state funds. To do otherwise forces courts to engage in a detailed audit of the defendant's finances to determine whether the defendant department or subdivision is indeed "the state." The district court hit the nail on the head: "Where Illinois gets the money to satisfy a judgment is no concern of the plaintiff or the court; what matters is that the judgment runs against the state." *Cosby*, 741 F. Supp. at 742. Moreover, it stands to reason that digging into a segregated account funded by federal money to pay retroactive claims could have an impact on the state treasury. For example, it is not altogether clear that total reimbursement from the federal government to the state is a sure thing. Title 42 § 502(a),

the section of the United States Code dealing with computation of amounts paid to the states for proper administration of their employment compensation programs, states that the Secretary of Labor "shall not certify for payment under this section in any fiscal year a total amount in excess of the amount appropriated therefor for such fiscal year." In an era of mandatory budget reduction and rising unemployment rates, there is no guarantee that the federal government will continue to be "Johnny-on-the-spot" with ready cash in hand.

The trust fund argument also flies in the face of two United States Supreme Court decisions that have held that the segregation of funds does not abrogate the eleventh amendment. In *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946), and *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944), taxpayers sued state officials to

recover taxes paid under protest. The money was segregated and held in trust pending the outcome of the litigation. In both cases, the Court held that the suits were against the state as an entity and thus barred by the states' sovereign immunity. It is an "immaterial difference," *Great Northern*, 322 U.S. at 43, that the money is segregated and held separate from the state's general funds when, in the end, any damage award is against the state.

As a last resort, the claimants suggest that the Supreme Court's eleventh amendment jurisprudence has changed significantly since *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1983). They contend that, "under the Court's recent analysis, whether a state is protected by sovereign immunity turns on the balance between 'the effect[s] of the relief sought,'" Appellants' Brief at 26 (quoting *Pennhurst*, 465 U.S. at 107).

Naturally, the claimants argue that, when all factors are considered, the balance of equities tips in their favor because they seek a remedy of IDES's violation of the claimants' federal rights. More pointedly, the claimants argue that if we rule against them, the EB claimants would be left without a remedy because the EB program switches "on" only during periods of significantly high unemployment. It has been "off" for six years.

Pennhurst -- as we read it -- recognizes a need to balance the supremacy of federal law against the constitutional immunity of the states, but does not abandon the basic reasoning of *Edelman* and *Young*. In fact, the Court in *Pennhurst* reiterated that "[u]nder the theory of *Young*, [a lawsuit challenging the constitutionality of a state official's action] would not be one against the State since the federal-law allegation would strip the state officer of his official authority.

Nevertheless, retroactive relief [is] barred by the Eleventh Amendment." 465 U.S. at 103. The Court emphasized that the recognition of the need to accommodate these competing interests is "the significance" of *Edelman*: "*Edelman's* distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the States." *Id* at 106. The claimants are seeking vindication of their federal rights through a retroactive damage award against the State. As we see it, this interest is insufficient to override the command of the eleventh amendment.

The relief claimed by the claimants is barred by the eleventh amendment. The order of the district court approving the consent decree and dismissing the complaint is hereby

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

No. 83 C 3116

Irving COSBY, et al., Plaintiffs,

v.

Sally JACKSON, Director of the Illinois Department of Employment Security, et al., Defendants.

No. 83 C 3116.

United States District Court,
N.D. Illinois.

August 16, 1990.

OPINION

EASTERBROOK, Circuit Judge*

Earlier proceedings, see 625 F.Supp. 619 (N.D.Ill.1985), affirmed in part and reversed in part, 843 F.2d 967 (7th Cir.1988), left this case in potential need of a second trial to determine whether the state's procedures for adjudicating claims for extended unemployment benefits complied with the due process clause of the fourteenth amendment. The parties decided that settlement would be

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* Of the Seventh Circuit, sitting by designation.

preferable to extended combat, and they negotiated a consent decree concluding most of the case.

This decree provides that the Illinois Department of Income Security shall give applicants for benefits concrete notice of the extent to which they must search for work. Requirements tailored to individual circumstances are possible, but the decree includes a notice, suitable for all comers, that suffices. It tells applicants that they must do something every day to find work, that they must be prepared to accept the minimum wage (or their own levels of supplemental unemployment benefits), and that they must be willing to travel 90 minutes each way to and from work. The decree also provides forms the Department will send to claimants informing them of the issues (but not the evidence) to be raised during interviews with claims adjudicators or hearings before referees.

Finally, the decree affords its benefits to all persons whose adjudications are not yet final. I approved this decree, after a hearing under Fed.R.Civ.P. 23(e), because it resolves the principal issues presented by the case yet preserves the Department's freedom to change policy, so long as it continues to provide the constitutionally necessary notice. See *Bates v. Johnson*, 901 F.2d 1424 (7th Cir.1990).

What the parties could not resolve is whether retroactive relief is possible. This question has two stages: first, whether the state violated the Constitution at all (a question that could be resolved only after a second trial); second, whether, if so, the eleventh amendment allows the court to afford relief to persons whose unemployment claims were resolved and closed before the date of its decision. Because *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662

(1974), gives the general answer "No" to this second question, the parties have concentrated their attention on whether the nature of unemployment compensation creates an exception to *Edelman*.

Plaintiffs submit that it does, because the money to pay for unemployment benefits (and hence any retroactive relief) does not come from the state's general revenues. Illinois maintains a segregated fund that is financed by "contributions" (read, taxes) from employers, Ill.Rev.Stat. ch. 48 ¶¶ 550-581. Illinois pays all regular, extended, and supplemental unemployment benefits from this fund. The United States reimburses Illinois for half of the cost of the extended benefits and all of the cost of the supplemental benefits. Most of the money thus derives from the federal rather than the state treasury; even the portion nominally paid by Illinois "really" comes from employers rather than the

people at large. Because the general revenues of the state are not threatened, plaintiffs conclude, the eleventh amendment does not apply. One court of appeals has embraced this line of argument. *Brown v. Porcher*, 660 F.2d 1001, 1006-07 (4th Cir.1981), cert. denied, 459 U.S. 1150, 103 S.Ct. 796, 74 L.Ed.2d 1000 (1983) (over the dissent of three Justices.).

Illinois replies that the source of the funds is irrelevant. The eleventh amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

The "Judicial power" -- that is, federal jurisdiction -- does not embrace a suit "commenced or prosecuted against one of the

United States". Where the state gets the money to pay a judgment, indeed whether the suit asks for money, is irrelevant to this rule. A court's first and only question is whether the defendant is "one of the United States". If the answer is yes, then the suit is forbidden. Because a state official sued in an official capacity (which describes all of the defendants to this suit) is treated as a "state", *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107, 87 L.Ed.2d 114 (1985), the suit fails at the threshold. How Illinois would satisfy the judgment -- in particular, that Illinois gets money from employers and the federal government -- is irrelevant. One court of appeals has rejected *Brown* and held that the source of payments for retroactive unemployment compensation does not affect the scope of immunity the eleventh amendment affords. *Esparza v. Valdez*, 862 F.2d 788, 794-95 (10th Cir.1988), cert.

denied, ___ U.S. ___, 109 S.Ct. 3214, 106 L.Ed.2d 565 (1989). I agree with *Esparza* and disagree with *Brown*.

Start with the text of the Constitution. Because this is a suit "commenced or prosecuted against one of the United States", the eleventh amendment applies.[1] Even prospective relief cannot be had against "one of the United States". *Cory v. White*, 457 U.S. 85, 90-91, 102 S.Ct. 2325, 2328-29, 72 L.Ed.2d

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[1] Putting to one side the question whether the eleventh amendment (as opposed to general notions of sovereign immunity) applies at all to federal-question or constitutional litigation. The text speaks only of cases under the diversity and alienage jurisdictions. Because prevailing doctrine treats the principles of sovereign immunity applicable to federal-question cases (including constitutional cases) identically to those under the eleventh amendment, I treat this case as if the eleventh amendment governs directly. But see *Pennsylvania v. Union Gas Co.*, ___ U.S. ___, 109 S.Ct. 2273, 2286-89, 105 L.Ed.2d 1 (1989) (Stevens, J., concurring), arguing that the "actual" eleventh amendment is stronger than the background principles of sovereign immunity that apply in the absence of a statute.

694 (1982); *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *Adams v. Indiana*, 795 F.2d 27 (7th Cir.1986). So if this is a suit against Illinois, the court cannot grant the plaintiff's request.

There is of course a long tradition of awarding injunctive relief that effectively governs states, but this depends on *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 411, 52 L.Ed. 714 (1908), which holds that state officials who violate the Constitution aren't "really" acting for the state at all. The relief runs against *them*, not against "the state". Because the decree does not bind "one of the United States", it does not encounter the eleventh amendment. *Edelman* holds that *Young* does not authorize damages relief. A court cannot pretend that the state actors before it are acting as private parties when the relief comes out of the state's pockets. Even fictions have their limits; retroactive relief

presses the *Young* fiction past the breaking point.

What I need to decide, then, is whether the plaintiffs want relief from "one of the United States". To that the answer must be "Yes". They have sued state officials in their official capacities only, see *Graham*. Retroactive relief would bind the state in its role as a sovereign. That Illinois could recoup the outlay from someone else does not diminish the quality of the judgment as one against the state. If a retailer that sells a defective toaster impleads the manufacturer in response to an action on the warranty, the judgment binds the retailer even though the manufacturer's pockets ultimately will be tapped for payment. Closer to the mark stands the principle that a state's willingness to indemnify its employees for liability under 42 U.S.C. § 1983 does not mean that the litigation is against "the state". *Duckworth*

v. Franzen, 780 F.2d 645, 650-51 (7th Cir.-1985). A plaintiff may look only to the defendant for satisfaction of the judgment; where the employee gets the money is no concern of the plaintiff or court. So too with suits against the state. Where Illinois gets the money to satisfy a judgment is no concern of the plaintiff or the court; what matters is that the judgment runs against the state.

I recognize that many decisions, including at least one from the Seventh Circuit, closely examine the source of funds to pay a judgment. *Miller-Davis Co. v. Illinois State Toll Highway Authority*, 567 F.2d 323, 327-30 (7th Cir.1977). They do this, however, not because the eleventh amendment permits suits against "one of the United States" when the state has a segregated fund, but because it is often unclear whether the defendant is "one of the United States". Special-purpose

districts and agencies have proliferated; these may have many of the aspects of private corporations, with some of the aspects of a state. What are we to make of a university system with some public trustees, some private trustees, an endowment, tuition income, and an appropriation from the state treasury? Questions such as this send courts scurrying to examine the details of the defendant's structure and finances. To determine whether the defendant is "the state", courts look at who appoints and controls the entity, who pays judgments against it, and so on. That was the point in *Miller-Davis*, ending in the conclusion that an entity outside the direct chain of control in the executive branch of Illinois and without access to its Treasury was not "the state" after all. No one doubts, however, that the Illinois Department of Employment Security is part of Illinois. It

is a line agency of the executive branch, answerable to the Governor.

Knowing that the Illinois Department of Employment Security is "one of the United States" brings the case to a close. That Illinois funds the Department's operations by taxing employers does not make it less a state operation. Most state revenues come from taxes, and the identity of the taxed group cannot matter. Neither does it matter that the federal government offers reimbursement. Money flows in because the federal government gives money to *states* for particular programs. Segregation of the monies also cannot matter. Everything the plaintiffs say about unemployment compensation could be said about the Social Security program, with a special tax base and segregated receipts. Yet the Supreme Court regularly applies principles of sovereign immunity to suits in which judgments would be satisfied out of the

Social Security Trust Fund. *E.g., Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988), in which all Justices assumed that sovereign immunity would forbid even prospective relief affecting the Trust Fund in the absence of a statute waiving that immunity. Just so, the source of the money to pay unemployment

benefits does not make the suit less one against the State of Illinois. *Edelman* itself involved state funds that were replenished by the federal government. See also *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573, 66 S.ct. 745, 90 L.Ed. 862 (1946); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 64 S.ct. 873, 88 L.Ed. 1121 (1944).

Because retroactive relief would run against a state, the eleventh amendment forbids the court to award a remedy -- including "notice relief", *Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371

(1985); *Watkins v. Blinzinger*, 789 F.2d 474, 483-84 (7th Cir.1986). It is consequently unnecessary to decide whether Illinois violated the Constitution; relief beyond that approved in the consent decree would be impossible even if it did. The court will accordingly enter a final judgment approving the consent decree and otherwise dismissing the complaint on the basis of the eleventh amendment.

No. 86-1181

**Irving O. COSBY, et al.,
Plaintiffs-Appellants,**

v.

**Sally WARD, Director of the Illinois Department of Employment Security of the Illinois Department of Labor, et al.,
Defendants-Appellees.**

No. 86-1181.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 24, 1986

Decided March 4, 1988.

Before, WOOD, COFFEY, and RIPPLE, Circuit Judges.

HARLINGTON WOOD, Jr., Circuit Judge.

Plaintiffs are representatives of two classes of unemployment insurance claimants. They brought suit under 42 U.S.C. § 1983 against the Director of the Illinois Department of Employment Security (IDES), the United States Department of Labor (DOL), its Secretary, and the Assistant Secretary of Labor for Employment and Training, alleging that IDES's administration of two unemployment

insurance programs violated federal law and the plaintiffs' due process rights under the United States Constitution. After the plaintiffs presented their evidence, the state defendants moved for an involuntary dismissal of the action under Federal Rule of Civil Procedure 41(b). The district court granted the motion and entered judgment against the plaintiffs who have appealed. We affirm on the statutory issues, reverse on the constitutional issues, and remand for further proceedings on the latter issues.

I. FACTUAL BACKGROUND

The district court adopted the parties eighty-seven-page stipulation of facts. We will do the same, providing only a brief summary drawn from the stipulations and the district court's findings. *See Cosby v. Ward*, 625 F.Supp. 619 (N.D.Ill.1985).

A. The Programs

Unemployed people in Illinois who are eligible for unemployment insurance are entitled to the lesser of either twenty-six weeks of regular benefits payments, or the total insured wages for a base period. Illinois Unemployment Insurance Act (IUI Act), Ill.Stat.Ann. ch. 48, ¶¶ 300-820. After these regular benefits are exhausted, the claimant may be eligible for payments under two other programs: the extended benefits (EB) program, or the federal supplemental compensation (FSC) program. The EB payments are made under the Federal-State Extended Unemployment Compensation Act of 1970 (EUC Act), 26 U.S.C. § 3304(a)(11), and IUI Act § 409, Ill.Stat. Ann. ch. 48, ¶ 409. Benefits under the program become available when unemployment in the state reaches a specified level. A claimant may receive up to thirteen weeks of EB payments.

After a claimant has exhausted both his regular benefits and EB, he may be eligible for payments under the FSC program. Federal Supplemental Compensation Act of 1982 (FSC Act), 26 U.S.C. § 3304 note. The maximum period for a claimant to receive FSC payments is from ten to twenty-six weeks. There is no requirement of a "trigger level" of unemployment as there is under the EUC Act.

Regular benefits are paid by the state from taxes collected from employers. The state makes EB payments also, but the federal government reimburses the state for fifty percent of the program's cost under section 204 of the EUC Act. The federal government pay all FSC benefits under the FSC Act, and also compensates states for the costs of administering EB and FSC programs.

In order to receive federal money, the state must comply with federal statutes and interpretations thereof by the DOL and

Illinois has entered into a contract with the DOL, agreeing to abide by the FSC program rules. The EUC Act and the FSC Act require people claiming EB to actively search for work. They must provide the state with evidence of their search efforts. There is no statutory provision explaining exactly how a claimant can demonstrate compliance with these requirements.

After a claimant has exhausted his regular benefits, a claims technician at the local IDES office explains to the claimant that he may be eligible for further benefits. The technician gives each claimant a written notice about the programs and explains the notice. Many technicians are multi-lingual, and each office has technicians who speak the language of the local population. Notices about the programs, however, are written in English. Claims technicians give claimants form questionnaires to return every two weeks.

The questionnaires ask for information about the claimant's search for work, and include such questions as "[w]hat is the lowest starting wage you will accept?" and "[h]ow long (in time) are you willing to travel each way to work?" These questions and answers are used to identify restrictions that the claimant may be placing on his work search. Claims that are clearly acceptable are processed for payment. Claims that raise questions about the claimant's restrictions are sent to an adjudicator. When this happens, an employee of the local office will send the claimant a notice that he is to appear in person at the local office. although this notice is also intended to inform the claimant of the problem, the district court found that "frequently it is filled out in such a perfunctory fashion that the claimant could not know why he had been summoned." 625 F.Supp. at 625.

The adjudicator discusses with the claimant his answers to the questionnaire, and decides whether the claimant has understood the questions and answers. If the adjudicator finds that the claimant misunderstood a question, the adjudicator may allow him to withdraw his original answer and supply a correct one. The claimant may even return home to retrieve additional documentation for his answers. The adjudicator will not, however, coach a claimant on acceptable answers, and once the adjudicator has determined that the claimant's restrictions are unreasonable, the claimant can no longer "correct" his answers. At the conclusion of the interview, the claims adjudicator will render a written decision on the claimant's eligibility for benefits. If the claimant is found to be ineligible, he will be denied benefits for the two-week period covered by the questionnaire. Once denied benefits, a

claimant is not eligible for benefits again until he has worked for at least four weeks.

A claimant who is denied benefits by a claims adjudicator may appeal that denial to a referee. Referees are lawyers who are independent of the vagaries of the local offices. The claimant may file written reasons for his appeal, and, when he meets with the referee, he may present evidence. If the claimant does not speak English, and the referee does not speak the claimant's language, IDES will appoint an interpreter. The hearing is recorded. After reviewing with the claimant his questionnaire and the meaning of the claimant's answers, the referee will make a new determination of the claimant's eligibility. He is not bound by the adjudicator's findings. The referee will file a written decision, which is more formal than the adjudicator's decision. The claimant may

appeal this decision, if it is unfavorable to him, to the Board of Review.

The Board of Review is a administrative court within IDES. As a party may do in other courts, a claimant may file written briefs, personally or by counsel, arguing legal and factual questions. Unlike the referee, the Board may not disregard the previous findings, but instead makes its decision based on the record established before the referee. Decisions are not routinely published, but IDES maintains a digest of the Board's decisions both for its own purposes and for the public. A manual of benefits decisions also provides the public with access to some of the Board's decisions.

The last avenue for appeal is to the state courts. Ill.Stat.Ann. ch. 48, 520; ch. 110, ¶¶ 3-101 to -112. By the time this level of review is accomplished, however, many months have passed.

Claims technicians, adjudicators, and referees all receive training from IDES on the nature of and criteria for the benefits programs. All of these people receive copies of the hundreds of bulletins that IDES sends out. Although they may not remember each specific bulletin, the district court found that "the technicians, adjudicators, and referees who testified were familiar with the general principles in the bulletins." 625 F.Supp. at 625.

In making their decisions on a claimant's eligibility for benefits, reviewers (claims technicians, adjudicators, referees, and the Board) have at their disposal two sources of information that they frequently do not use. One of these sources is a newsletter that IDES publishes through its Economic Information and Analysis Unit. This Unit collects information about Illinois labor markets and its newsletter contains data about the state

as a whole, and in city and county segments. Information about smaller areas is contained in quarterly publications. The district court found that "the Unit does not determine whether there are openings in particular occupations, and none of the [reviewers] who testified made any use of the data disseminated by the Unit." 625 F.Supp. at 626.

Another potential source of information for the reviewers is the Job Service, the state agency that helps unemployed people find work. Registration with Job Service is a prerequisite to eligibility for any unemployment compensation. Claimants and Job Service counselors work together in devising for a claimant a plan to search for new work. Although the counselors presumably know where a claimant can look for work to suit his particular skills, they do not ensure that the claimant's plan complies with the work search rules used by the unemployment offices.

Similarly, the approval by Job Service of a claimant's work search plan carries no weight with the administrators of the EB or FSC programs.

B. State Implementation

Benefits under the EB and FSC programs are restricted by federal law to people actively seeking work. To implement this law, IDES has issued to its staff several bulletins pertaining to the work search requirement. One such bulletin contains the following language.

> Due to the EB claimants' prolonged period of unemployment, it is intended that he be required to make a more diligent effort to seek work than would normally be required of an individual receiving regular benefits. Accordingly, the weekly eligibility of each EB claimant must be monitored in light of the special requirements concerning search for

work.... All EB claimants must be advised of the work search requirements that they must meet each week.... It is expected that the EB claimant's efforts to find work should increase because of the duration of his unemployment.

If there are no or few openings in the claimant's customary occupation, he must broaden the types of work sought to meet the active search for work requirement. Claimants who restrict their job search to their customary occupation, or who have other restrictions (i.e., wages, hours, travel, etc.) not based upon physical or mental capability, and by these restrictions fail to maintain an active systematic search for work, may be ineligible for extended benefits.

In determining whether the individual has met the active search for work

requirement, where openings in the individual's customary occupation are few or nonexistent, the following areas shall be considered:

a. Available Jobs -- Hiring pattern

b. Economic Activity -- Labor market

c. Claimant's physical and mental ability

....

The level of economic activity in the labor market area and the kinds of work available are important factors in determining whether a systematic and sustained work seeking effort is being made. Eligibility Review Program and Job Service information and any job counseling interviews as well as the results of aptitude testing would be pertinent.

IDES Bulletin No. 1467, Supp. 1 (Aug. 20, 1981). The form that the claims technicians

give to claimants includes the following information:

> You are expected to relax your restrictions with respect to the type of work you will accept, hours, rate of pay, travel, time, etc. (for example: A senior accountant would be required to accept work as a junior accountant or bookkeeper, etc.) ... If there are no or few openings in your regular occupation, you are expected to seek any work within your physical and mental capabilities for which you have the background to perform.... You may use your usual methods of contacting potential employers (in-person contacts, registration with private employment agencies, reporting to your union as required, answering or placing want ads, resumes, telephone calls, etc.,) [sic]. However, your work search must include some independent work

> search efforts each week for this reason....
>
> ... If you do not have a definite prospect to return to work in 4 weeks or less, your job prospect classification in [sic] "not good". If your classification is "not good", any work that is within your physical and mental capabilities that you have the background to perform is suitable, provided that ... the gross average weekly wage exceeds your weekly benefit amount (plus any supplemental unemployment benefits paid to you by a former employer)....
>
> If you fail to conduct an active search for work or you refuse to apply for or to accept suitable work ... you will be held ineligible for Extended Benefits for the week in which such failure occurred and for each week thereafter until you have worked in at least 4 weeks

with earning in each week, which when totaled, equals at least 4 times your weekly benefit amount.

Benefit Rights Information for Extended Benefits Claimants form.

When a claimant is ineligible for EB, either because the program is not in effect in Illinois or because he has exhausted his benefits, he may be eligible for FSC. The IDES issued bulletins with instructions for implementing the FSC program. The bulletins do not interpret the program's requirement that a claimant seek work actively, but there is no suggestion that the requirement has a different meaning than it does under the EB program.

Claimants seeking FSC benefits were given the following instructions for seeking work:

(1) On each normal working day you must do something positive to find work.

(2) ... You must make work contacts on at least 3 days per week, resulting in at least 5 employer contacts per week. This may mean looking for work beyond your normal commuting distance as well as increasing one-way travel time. You are expected to lower your salary demands, even to the minimum wage, if there are no prospects of finding work in your customary occupation.

(3) If there is any day in which you made no employer contacts, you must indicate on the form what positive effort you made that day to find work, for example, preparing a resume, contacting a union or a professional organization, attending an employment seminar, etc.

(4) If prospects for obtaining work in your usual occupation are poor

(that is, if you do not have a *definite* offer to begin work within four weeks ...), you will be expected to accept any offer of suitable work that is listed with the State Job Service or offered in writing. Any work will be considered suitable if you are reasonably fitted by training and experience to perform the work or if the necessary training is provided when you lack the required skills.

To be suitable, the gross pay of any work offered must exceed your weekly benefit amount plus any Supplemental Unemployment Benefits (SUB) you receive form your former employer, or the State or Federal minimum wage, whichever is greater.

The law provides for denial of FSC to anyone who does not observe the above

requirements. The disqualification will continue until the person has worked in at least four weeks and earned not less than four times his or her weekly benefit amount.

Important Notice for Federal Supplemental Compensation (FSC) Claimants form.

Although these notices to claimants did not elucidate bright-line rules for the conduct of their work search other than the requirements that a claimant must make five contacts with potential employers over at least three days of every week and that a claimant must accept any wage over the stated minimum, the plaintiffs claimed, and the district court found, that IDES used objective rules of thumb to determine claimants' eligibility for benefits. 625 F.Supp. at 629. These rules of thumb developed to help the reviewers evaluate claimants' questionnaires. Claims routinely would be denied if the

claimant did not state that he would travel at least one hour each way for work. Similarly, a claimant must have said that he was willing to work on different shifts for at or near the minimum wage. A claimant also was required to visit employers in person. When claimants were questioned about their answers on the questionnaire, they had the opportunity to revise these answers. However, they did not know about the rules of thumb, and inadequate answers to the questions were used to demonstrate that they were not engaged in an active search for work.

Although adjudicators and referees testified at trial that the rules of thumb were not necessary to evaluations of claims, the district court found that the rules were rarely relaxed. *Id.* The court also found that the reviewers would not "test" claimants' answers to items on the questionnaire, or use collateral methods to determine, for example,

the distance claimants were actually traveling to search for work, or the wage claimants were requesting on job applications. The reviewers simply let the claimants disqualify themselves by accepting their answers at face value.

The district court found that IDES decisionmakers, despite the requirements in their own bulletins, did not use information about the labor market or job openings in evaluating claims from people whose job prospects were "not good". "They do not know which occupations have 'few or no openings'; they do not know anything systematic about levels of economic activity." 625 F.Supp. at 629. The district court went on, however, to find that the IDES decisionmakers were adequately apprised of employment conditions in claimants' occupations from information gleaned from the claimants themselves. They could detect patterns of unemployment from the claimants' occupations, and from the

length of time they had been unemployed. This sort of empirical knowledge gave the reviewers the ability to make "astute inferences" about the labor market. *Id.*

C. Federal Regulations

The DOL administers the EUC Act and the FSC Act federally. This amounts to assessing the state' compliance with the federal regulations in their programs to determine whether to reimburse the states. Pursuant to the EUC Act, Illinois enacted section 409 of the IUI Act, which reproduces the federal rules. Pursuant to the FSC Act, Illinois and the DOL in September 1982 entered into a contract under which the state promised to "'perform all of the functions and duties ... in accordance with the [FSC] Act as interpreted by the Secretary or the Department of Labor.'" 625 F.Supp. at 630.

The district court found that although the DOL has not promulgated any regulations

concerning the administration of the EUC Act or the FSC Act, it has circulated to state employment security agencies "general administration letters" (GALs) and "unemployment insurance program letters" (UIPLs). *Id.* These letters are sometimes published in the Federal Register; the district court, however, found that they were not regulations because they were not circulated for notice and comment before the DOL adopted them. *Id.* Advance copies of GALs were sometimes available to state agencies, but, according to the court, this was for the purpose of supplying extra notice, not an opportunity to comment. *Id.* The court found that "the addressees of the GALs did not have the sort of personal service that would permit the documents to be treated as regulations in the absence of published notice and opportunity for comment." *Id.* (citing 5 U.S.C. § 553(b)).

The court found that, at the time of trial, the definitive GAL was 2-83, in which the DOL stated that the requirements for seeking work under the FSC Act were the same as those under the EUC Act. *Id.* at 631; GAL 2-83, 47 Fed.Reg. 54706 (1982); *see also* UIPL 7-84, 49 Fed.Reg. 4271 (1984). The EUC Act requirements are described in GAL 21-81, an unpublished letter. *See* Appendix. The EUC Act generally requires a claimant to make a more active, "systematic and sustained," search for work than a recipient of regular benefits. He must broaden the types of work he seeks, and lower his wage expectations. If a claimant fails to accept a job offer which pays at least the minimum wage and not less than his benefit payments, he will be disqualified from receiving further EB payments. The EUC Act generally requires the state to evaluate the claimant's job search in light of the claimant's physical and mental

ability, job openings, and the labor market conditions. The state classifies each EB claimant's job prospects as "good" or "not good" and monitors each claimant's eligibility by requiring "tangible evidence" of an active and suitable search for work each week. This evidence must be in line with the state's standards for a "systematic and sustained" search for work. A claimant whose job prospects are "good" has less stringent work search requirements than a claimant whose prospects are "not good."

The plaintiffs argue that by following rules that are stricter than the federal requirements IDES violated the EUC Act, the FSC Act, the DOL letters, the Social Security Act (42 U.S.C. § 503(a)), and the plaintiffs' rights to due process under the fourteenth amendment to the Constitution. Specifically, the plaintiffs alleged at trial that IDES's standards are based not on claimants' actual

work search efforts but instead on answers to hypothetical questions that do not relate well to the federal requirements. The plaintiffs also argue that claimants are disqualified from receiving benefits by the state without regard to the DOL guidelines. They assert that they are subject to disqualification based on answers to the hypothetical questions without receiving adequate notice of what is expected of them. Additionally they contend that the notice claimants do receive is incomplete with regard to the work search requirements. Because of the inadequate notice, the plaintiffs assert, they are subject to disqualification at interviews and hearings without being informed about what matters are before the claims adjudicators or referees. The district court found no merit in any of these contentions, and granted defendants' motion for involuntary dismissal under Federal Rule of Civil Procedure 41(b).

The plaintiffs argue that the trial judge erred in granting this dismissal. We agree and remand to the district court.

II. STANDARDS OF REVIEW

"In ruling on a [Rule] 41(b) motion, the court must take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as the court believes it is entitled to receive." *Sanders v. General Services Administration*, 707 F.2d 969, 971 (7th Cir.1983). "The district court should make no special inferences in the plaintiff's favor .. [but] must weigh all the evidence and decide where the preponderance lies." *Furth v. Inc. Publishing Co.*, 823 F.2d 1178, 1179 (7th Cir.1987).

With respect to undisputed facts, such as the stipulated facts in this case, a reviewing court "is as capable as was the district court of determining whether [plaintiffs'] evidence, as a matter of law, was

insufficient to establish a right to relief." *James Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 273 (7th Cir.1976). The district court's findings of fact, however "shall not be set aside unless clearly erroneous." Fed.R.Civ.P. 52(a). "[T]he clearly-erroneous rule ... embraces not only facts of the 'who did what to whom' variety but also legal inferences from those facts." *Wright v. United States*, 809 F.2d 425, 428 (7th Cir.1987). A reviewing court may determine a finding is clearly erroneous only when the court is left "'with the definite and firm conviction that a mistake has been committed.'" *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948)). "[T]he question [of] whether the district court's fact findings are clearly erroneous

is separate from the question [of] whether, under the facts and the law, the plaintiff has shown no right to relief." *Furth*, 823 F.2d at 1180 (citing 5 J. Moore, J. Lucas, and J. Wicker, Moore's Federal Practice ¶ 41.13[1], at 41-166 to -167 (2d ed. 1986)). Based on the district court's findings of fact, this court must determine as a matter of law whether the plaintiffs proved by a preponderance of the evidence that IDES's administration of the state's unemployment insurance program violated the federal statutes or the Constitution.

III. DISCUSSION

The plaintiffs claim that the state incorrectly distinguished between eligible and ineligible claimants based on the state's interpretation of the work search rule. They argue that IDES's use of its rules of thumb violated the DOL letters, specifically, GAL 21-81. The plaintiffs also challenged IDES's

failure to use labor-market and hiring pattern information in its determinations of eligibility.

A. Jurisdiction

Because they challenge IDES's administration of the EB and FSC programs as violative of the Constitution and federal laws, the plaintiffs believe that their case is clearly within the language of 28 U.S.C. § 1331, which provides federal district courts with "original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." The federal defendants assert that the district court lacked subject matter jurisdiction over the action, and moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(1). The court denied the motion, setting forth its reasoning in a memorandum opinion. *Cosby v. Bernardi*, No. 83 C 3116 (N.D.Ill. Apr. 4, 1984).

The defendants raise only one of their four jurisdictional arguments on appeal. They assert that the language of the EUC Act and the FSC Act authorizes only state courts to review EB and FSC benefit determinations,[1] and that these acts supersede 28 U.S.C. § 1331. Therefore, the defendants believe, the plaintiffs should have brought their case in

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[1] The EUC Act states that

> [e]xcept where inconsistent with the provisions of this title, the terms and conditions of the State law which apply to claims for regular compensation and to the payment thereof shall apply to claims for extended compensation and to the payment thereof.

EUC Act 202(a)(2), 26 U.S.C. § 3304 note. The FSC Act states that

> the terms and conditions of the State law which apply to claims for extended compensation and to the payment thereof shall apply to claims for Federal supplemental compensation and the payment thereof; except where inconsistent with the provisions of this subtitle or with the regulations of the Secretary promulgated to carry out this subtitle.

FSC Act § 602(d)(2), 26 U.S.C. § 3304 note.

state court, pursuant to the Illinois Administrative Review Act, Ill.Stat.Ann. ch. 110, ¶¶ 3-101 to -112. The district court found this argument to be meritless and we agree.

The Supreme Court considered language similar to that in the EUC and FSC Acts in a union's challenge to state agencies' administration of the Trade Act of 1974, 19 U.S.C. § 2101 et seq. *International Union, UAW v. Brock*, 477 U.S. 274, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986). The UAW argued that the states were improperly determining eligibility for trade readjustment allowance (TRA) benefits. The Secretary of Labor relied on language in the Trade Act which made TRA entitlement decisions by state agencies "subject to review in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to the extent," 19 U.S.C. § 2311(d), to argue that no union members could challenge

the DOL's policy directive that allegedly resulted in denial of TRA benefits to union members. The Court found that "[t]he Secretary's arguments simply miss the point of petitioners' claims." 106 S.Ct. at 2530. The federal courts were not becoming involved, through the UAW's suit, in individual benefits determinations, which would "remain the province of state authorities," *id*, but were instead asked to rule on the validity of the states' administration of the entire program in terms of compliance with federal law and the Constitution. While the language in the Trade Act, which is more restrictive than that of the EUC Act or the FSC Act.,

> vested state courts with exclusive jurisdiction over claims challenging a state agency's application of federal guidelines to the benefit claims of individual employees, there is no indication that Congress intended §

2311(d) to deprive federal district courts of subject-matter jurisdiction under 28 U.S.C. § 1331(a) ... to hear statutory or constitutional challenges to the federal guidelines themselves. Indeed, we have frequently upheld a contrary principle: that although review of individual eligibility determinations in certain benefit programs may be confined by a state and federal law to state administrative and judicial processes, claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court.

106 S.Ct. at 2530. This is just such a challenge. *See Ohio Bureau of Employment Services v. Hordory*, 431 U.S. 471, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977); *Christian v. New York State Department of Labor*, 414 U.S. 64, 94 S.Ct. 747, 39 L.Ed.2d 38 (1974).

The defendants strive to recharacterize the plaintiffs' challenges to the state's administration of the EB and FSC programs as a mere request that the district court review several individual case histories and evaluate the practices of some individual agency personnel; we find the plaintiffs' claims to be far more broad-based. The plaintiffs are not suggesting that the state erred in its computation of benefits and that a few people came up a few dollars short. Rather, they seek a declaration that IDES administered the EB and FSC programs in contravention of federal law, and an injunction ordering IDES to readjudicate their claims properly. Although "[t]he statutory challenges raised here will no doubt affect the outcome of individual entitlement determinations if [the claimants] are successful on the merits of their suit ... this action does not directly seek [EB or FSC] benefits." *International*

Union, 106 S.Ct. 2530. In light of the Supreme Court's interpretation of section 2311(d), and the true nature of the plaintiffs' challenge, we believe that defendants' argument that 28 U.S.C. § 1331 is superseded by the less restrictive language in the EUC Act and the FSC Act is without merit. This is precisely the type of action for which federal review is appropriate.

B. Preemption

The state rules are not preempted by the federal statutes and regulations. "Preemption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51

L.Ed.2d 604 (1977)). Neither the EUC Act nor the FSC Act explicitly states an intention on the part of Congress to preempt the states' work search requirements.[2] Nor does the legislative history evince any such intent.

The federal requirements regarding acceptable work for unemployment claimants were adopted by Congress in 1977. Pub.L. 95-19, § 104, 91 Stat. 39, 40 (1977). Their purpose was to supplant (with respect to supplemental unemployment benefits) the existing state criteria that allowed claimants to "refuse jobs without losing their eligibil-

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[2] To the contrary, both the EUC Act and the FSC Act provide that except where inconsistent, state law is to apply to claims under each Act. *See supra* note 1. Similarly, GAL 5-77 (issued Dec. 21, 1976), for example, which provides "specific direction in the areas of eligibility review and reemployment assistance," also states that "policies and procedures vary to such an extent that it is not readily feasible to prescribe a straight line procedure for implementing th[at] program." This language suggests that states are to retain some discretion in their implementation of the federal programs.

ity to receive unemployment benefits" and require claimants "to take any reasonable job opportunity that is available." S.Rep. No. 67, 95th Cong., 1st Sess. 8-9, *reprinted in* 1977 U.S.Code Cong. & Admin.News 79, 85-86. In order to be able to take advantage of any reasonable job opportunity, a claimant must engage in a search for such work. The legislative history of the EUC Act (the requirements of which the DOL has interpreted to be applicable under the FSC Act as well) provides that "[e]xtended benefits would be denied to any individual for so long as he or she fails to engage in a systematic and sustained effort to obtain work and fails to provide tangible evidence to the State agency that he or she has engaged in such an effort." H.R.Conf.Rep. 1479, 96th Cong., 2d Sess. 164 (1980), U.S.Code Cong. & Admin.News 1980, pp. 5516, 5952. This history does not explain or add anything to the statutory language,

and fails to support plaintiffs' contention that the federal search requirements implicitly preempt the state rules and practice.

> The Supreme Court has held that
>
> [w]here the pre-emptive effect of federal enactments is not explicit, "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.'"

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 747-48, 105 S.Ct. 2380, 2393-94, 85 L.Ed.2d 728 (1985) (citation omitted); *see also Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 720-22, 105 S.Ct. 2371, 2378-80, 85 L.Ed.2d 714 (1985). There is no such conflict here. The state has simply decided upon some

criteria to use in determining whether a claimant has engaged in an systematic and sustained search for work. Rather than conflict with the federal statutes, the state rules implement those laws.

The plaintiffs believe that the state rules are more stringent than the federal statutes and therefore conflict with the federal goal of

> protect[ing] workers still unemployed and unable to find jobs when their [regular] compensation ... is exhausted ... [by providing] additional unemployment compensation to people who are unemployed when unemployment is high and it is reasonable to expect that significant numbers of regularly employed people will be out of work for longer than normal periods.

S.Rep. No. 752, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.Code Cong. & Admin.News 3606,

3636. Congress also intended, however, to limit these benefits to claimants who actively seek work. By using its own criteria to evaluate claimants' work searches, the state is effectuating this intent.

Congress left administration of the unemployment statutes to a federal agency. *See Hillsborough County*, 471 U.S. at 721, 105 S.Ct. at 2379 (FDA has authority to preempt local legislation that imperils plasma supply). As the Supreme Court found in *Hillsborough County*,

> the agency can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements. Thus, since the agency has not suggested that [state regulations] interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal....

Id. The plaintiffs have not provided us with this kind of strong evidence of interference or conflict. We therefore find that the federal statutes and regulations have not preempted the state work-search rules. We discuss the DOL's efforts to monitor the states' administration of the EB and FSC programs in more detail in the next section.

As for the requirement that states consider labor markets and available jobs in evaluating claimants' efforts to find work, the district court found, correctly, that GAL 21-81 "does not insist that the state take account of labor markets and job openings in any particular way." 625 F.Supp. at 635. Reviewers within IDES are able to develop a perspective through which they can understand hiring patterns within specific industries, and the fact that the claimants with whom they deal have already been unemployed for at least twenty-six weeks is silent testimony about

labor markets in the state. The federal defendants concede that IDES may have better implemented the federal statutes had it specifically considered relevant economic data in each individual case, and coordinated the Job Service and unemployment benefits divisions of IDES more effectively. The fact that IDES did less than the optimum, however, does not render it performance inconsistent with the federal requirements.

Similarly, the fact that IDES may make mistakes in applying its rules does not amount to a violation of federal law. Because IDES uses categorical rules, it encounters problems of misclassification of claimants, and because it relies on claimants' self-reporting, it sometimes finds discrepancies between what claimants say and what they actually do. The district court recognized these problems but found that "the statutes do not proscribe all potential sources of error." 625 F.Supp. at

636. Categorical rules, the court found, are a practical necessity. "There are hundreds of decision-makers within the IDES, and unless the disposition of an application for EB or FSC benefits is to turn on the identity of the decider, it is necessary to have some fairly simple rules." *Id*. The court compared IDES's rules to the rules the Secretary of Health and Human Services (HHS) uses in administering disability programs. The Supreme Court sustained HHS's medical-vocational guidelines in *Heckler v. Campbell*, 461 U.S. 458, 467, 103 S.Ct. 1952, 1957, 76 L.Ed.2d 66 91983) ("even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rule-making authority to determine issues that do not require case-by-case consideration"). The IDES's rules of thumb are just such an attempt to determine issues that need not be continuously redecided. It is simply more

efficient for IDES to decide only once that a claimant should be willing to accept a lower wage, to travel a certain distance, to work different hours, to contact a certain number of employers each week. It is not necessary, and, indeed, would cause unfairness through inconsistent results, for IDES to decide each of these issues individually for each claimant. The IDES must *apply* these rules individually, and the plaintiffs have not shown that it does not.

Self-reporting also is a practical necessity in order to administer programs the size of the EB and FSC programs.[3] The district court found that "[i]n 1983 there were 136,930 new claims for EB and 231,355 new claims for FSC benefits." 625 F.Supp. at 637. Although the total declined in 1984

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[3] Indeed, as plaintiffs concede, the statutory requirement that a claimant provide tangible evidence of his work search implies self-reporting.

to 110 new claims for EB and 116,263 new claims for FSC benefits, *id.*, each claim required biweekly evaluation by IDES staff members, and even as the number of new claims were declining, the continuous monitoring of existing claims was a time-consuming task. The IDES was justified, as the district court found, in accepting claimants' responses to its questions rather than attempting to arduous if not impossible task of independently investigating each claimant's efforts to obtain work. This is consistent with the federal requirements.

C. The DOL Letters

The DOL does not require states to use rules of thumb in their eligibility determinations. *See* Appendix. The GAL is general in its terms, referring to "systematic and sustained" searches for work, available jobs, and economic activity in the labor market. The rules of thumb are much more specific,

with objective requirements as to the number of employers a claimant must contact per week (at least five), the method of contact (personal), the wage a claimant must accept (usually minimum wage), the minimum time a claimant is willing to travel (one hour), and the shifts that a claimant is willing to work (more than just the day shift). The plaintiffs assert that the effect of the DOL letters was not an issue at trial; the district court, however, believed that it was, and found that the letters were not rules with binding legal force.

The district court characterized the plaintiffs' claim as a preemption argument: "the state uses one rule, the federal government requires another, and under the Supremacy Clause the federal rule prevails." 625 F.Supp. at 632. Because the DOL letters were not legally binding, however, according to the district court, the plaintiffs could not

rely on them in challenging the state procedures. *Id.* at 633.

The plaintiffs dispute this finding, which is essentially a question of law. They argue that the DOL letters are in fact binding regulations, despite the fact that they did not comply with the notice and comment requirements of the Administrative Procedure Act (APA).

For a regulation to have the "force and effect of law," it must create "substantive" or "legislative" rules, rather than merely suggest an interpretation of a statute. Additionally, the regulation must be promulgated in conformation "with any procedural requirements imposed by Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03, 99 S.Ct. 1705, 1717-18, 60 L.Ed.2d 208 (1979).

The defendants do not dispute that the DOL letters are substantive, legislative regulations. As the plaintiffs point out,

Congress has expressly authorized the Secretary of Labor to "make and publish ... rules and regulations" regarding unemployment insurance issues, and the letters in question were issued to implement the EUC Act and the FSC Act. 42 U.S.C. § 1302; *see also* 42 U.S.C. § 902. Another indication that the DOL letters are legislative is their breadth. The letters are directions to the states in their administration of the EB and FSC programs, and affect the claimants' substantive rights.

The defendants do dispute the plaintiffs' assertion that the DOL letters were issued in compliance with Congress' procedural requirements, specifically the requirement that rules be published for notice and comment under the (APA). That requirement, however, does not apply "to the extent there is involved ... a matter relating to ... public property, loans, grants, benefits, or con-

tracts." 5 U.S.C. § 553(a)(2). Unemployment insurance benefits are clearly public benefits, and FSC is paid pursuant to a contract between IDES and the DOL. *See* FSC Act § 602(a). This contract is a "public contract" within the meaning of 5 U.S.C. § 553(a)(2). *Cf. Brown v. Housing Authority*, 471 F.2d 63, 67-68 (7th Cir.1972). Thus Congress has not required notice and comment to give the DOL letters the force of law.

The DOL waived the "benefits" exception to the notice and comment provision, reimposing on itself the notice and comment rules. 29 C.F.R. § 2.7. This voluntary reimposition of the rules does not amount to a "procedural requirement imposed by Congress," *Chrysler Corp. v. Brown*, 441 U.S. at 303, 99 S.Ct. at 1718; Congress had exempted this type of program from the APA's requirements. The DOL therefore did not have to publish it letters for notice and comment to give them the force

of law. *Cubanski v. Heckler*, 781 F.2d 1421, 1428 (9th Cir.1986), *cert. granted sub nom. Bowen v. Kizer*, ___ U.S. ___, 107 S.Ct. 1282, 94 L.Ed.2d 141 (1987).

Federal agencies, however, are required to publish "substantive rules of general applicability" in the Federal Register, even if the rules are not first published for notice and comment. 5 U.S.C. § 552(a)(1)(D). The GAL on which the plaintiffs rely most heavily, GAL 21-81, was not published in the Federal Register. The APA provides an exception to the publication requirement if the persons subject to the rules are either "personally served or otherwise have actual notice thereof in accordance with law." 5 U.S.C. § 553(b). The district court found that the state did not receive adequate notice of the DOL letters to permit the documents to be treated as regulations. 625 S.Supp. at 630. Testimony at trial demonstrated that

the DOL had begun circulating its letters in advance of their official issuance in 1982 or 1983, but that this was an unofficial practice and not uniformly followed. As the district court found, in some instances this practice was essential: One UIPL had in fact expired before its official date of issuance. The IDES employees who testified were uncertain as to when the GALs in question were received or by whom. One witness testified that the documents marked "advance copy" went to the regional offices of the DOL, but not necessarily to the state. We believe the district court was correct in finding that "the addresses of the GALs did not have the sort of personal service that would permit the documents to be treated as regulations in the absence of published notice and opportunity for comment." 625 F.Supp. at 630. Because GAL 21-81 was therefore not a binding

regulation,[4] the EUC Act and the FSC Act provide the only sources of authority, and unless the state's practices conflict with the statutes, they must be sustained. 625 F.Supp. at 633.

Although GAL 21-81, standing alone, is not a binding regulation on which the plaintiffs can base a challenge to the state's eligibility determinations, it is a binding construction of the EUC Act and the FSC Act between Illinois and the federal government pursuant to statute and contract. EUC Act § 201 et seq., 26 U.S.C. § 3304 note; FSC Act

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[4] The APA provides that "matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register." 5 U.S.C. § 552(a)(1). GAL 2-83, which directs the reader to see UIPL 14-81, GAL 21-81, and GAL 21-82 regarding the work search requirements, was published at 47 Fed.Reg. 54706 (1982). Because of our doubts as to the "reasonable availability" of the DOL letters, this section of the APA does not change our holding that GAL 21-81 was not a binding regulation.

§ 601 et seq., 26 U.S.C. § 3304 note. The plaintiffs seek to rely on the contract, but because they are not parties to it, they can use the contract only if a private right of action as third-party beneficiaries is available to them. As the district court found, "[n]o statute creates such a right of action or otherwise grants rights to the plaintiffs, so ... they may not automatically use the contract as a basis of a judicial order against the state." 625 F.Supp. at 633 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979)).

In determining whether the plaintiffs may rely on a contract to which they were not parties, we look to whether the contract was made for the plaintiffs' benefit. If the contract was *intended* to benefit plaintiffs, they have enforceable rights. "If the agreement was not intended to benefit the

third party, however, he is viewed as an 'incidental' beneficiary, having no legally cognizable rights under the contract." *Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir.1981). "The question is not whether the contracts would benefit the [plaintiffs], but whether the parties intended to confer an actionable right on the [plaintiffs]." *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1471, 1479 (7th Cir.1985). In other words, did the parties intend that the third party would have the right to sue in the event of a breach of contract? *Holbrook*, 643 F.2d at 1270 n. 17; *Price v. Pierce*, 823 F.2d 1114, 1121 (7th Cir.1987). The district court found that "[t]he plaintiffs may be the intended beneficiaries of the EB and FSC *programs*, but they are certainly not the intended beneficiaries of the *work search requirements*." 625 F.Supp. at 634 (emphasis in original). The EUC Act, the FSC Act, and GAL 21-81 serve the purpose

of putting limits on the states' administration of the EB and FSC programs. The work search rules are intended to assist state agencies in their determinations of whom to exclude from the program; they do not create rights in claimants. The federal government, which reimburses the states for their payments under the programs, benefits from the restrictions: the less people who receive payments, the less money the federal government must spend. We agree with the district court that "[i]t is not possible to draw enforceable rights in favor of claimants from the language of GAL 21-81." *Id.*

The DOL letters may be relied on as agency interpretations of the statutes to which some deference may be accorded, however, "'the courts have the reserve of power to substitute their own judgment on all questions of statutory interpretation.'" *Doe v. Reivitz*, 830 F.2d 1441, 1447 (7th Cir.1987)

(quoting 2 K. Davis, Administration Law Treatise § 7:11, at 55 (1979)). The EUC Act and the FSC Act call for claimants to make a "systematic and sustained" search for work. Although this is a phrase that is open to some interpretation, GAL 21-81 does not interpret it. The GAL is merely an elaboration on the statement, phrased in equally general terms. *See* Appendix. The GAL thus fails to provide us with an interpretation to which we can defer. The plaintiffs may not rely on the authority of the DOL letters in their challenge to IDES's administration of the EB and FSC programs.

D. The Social Security Act

The plaintiffs argue that instead of serving to make IDES more efficient, the rules of thumb actually hindered the state's eligibility determinations, slowing them down so much as to violate the "when due" provision of the Social Security Act. 42 U.S.C. §

503(a)(1).[5] This provision requires states to pay benefits "with the greatest promptness that is administratively feasible." 20 C.F.R. § 650.3(a); *Fusari v. Steinberg*, 419 U.S. 379, 387-88, 95 S.Ct. 533, 538-39, 41 L.Ed.2d 521 (1975)l *California Department of Human Resources Development v. Java*, 402 U.S. 121, 131, 91 S.Ct. 1347, 1354, 28 L.Ed.2d 666 (1971). Claimants receive prompt initial hearings before claims adjudicators, and the plaintiffs have not shown that subsequent delays were systematic or widespread. The court was presented only with anecdotal

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[5] 42 U.S.C. § 503(a) provides in part as follows:

> The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for --
>
> (i) such methods of administration ... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due....

evidence of delay in individual cases. "The plaintiffs did not introduce data on the average delay between the adjudicator's and the referee's hearings, however, and few claimants' cases reach this stage." 625 F.Supp. at 639. The court therefore concluded "that the Illinois system does not produce unacceptable delay." *Id.* The plaintiffs did not produce evidence to persuade us that this conclusion is erroneous. The plaintiffs suggest that if IDES had made sure that its Job Service personnel developed work search plans consistent with the GAL 21-81 factors and then transmitted copies of those plans from Job Service to the benefits determinations section of IDES, each claimant's work search could have been evaluated according to his plan, a result plaintiffs assert would have been more efficient. The plaintiffs do not suggest how this approach would better avoid delay, however. Examples of perhaps

isolated instances of delay and suggestions for alternative methods of administration are not enough to justify injunctive relief against the state. We find that the state did not fail to pay benefits "when due."

The plaintiffs also argue that the state violated the "fair hearing" clause of the Social Security Act.[6] "Whether the statutory 'fair hearing' requirement has been met is tested by the same standards as constitutional procedural due process." *Camacho v. Bowling*, 562 F.Supp. 1012, 1020 (N.D.Ill.1983) (citing *Ross v. Horn*, 598 F.2d 1312, 1318 n.4 (3d Cir.1979), *cert. denied*, 448 U.S. 906, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980)). If the state's procedures are consistent with the

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[6] 42 U.S.C. § 503(a)(3) requires a state to provide "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied."

Constitution, they will satisfy the requirements of the Social Security Act.

E. Due Process

The fourteenth amendment to the United States Constitution guarantees that no state shall "deprive any person of life, liberty, or property without due process of law." Because it is well-settled that claimants' receipt of unemployment insurance benefits is a property right, a state may not terminate these benefits without notice and an opportunity for a fair hearing. "[C]onstitutional due process requires notice that gives the [IDES's] reasons for its action in enough detail that a recipient can prepare a responsive defense." *Tripp v. Coler*, 640 F.Supp. 848, 857 (N.D.Ill.1986) (citing *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020-21, 25 L.Ed.2d 287 (1970); *Vargas v. Trainor*, 508 F.2d 485, 489 (7th Cir.1974), *cert. denied*, 420 U.S. 1008, 95 S.Ct. 1454,

43 L.Ed.2d 767 (1975)). "It is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose -- and resembles more a scene from Kafka than a constitutional process." *Gray Panthers v. Schweiker*, 652 F.2d 146, 168 (D.C.Cir.1980). Parties must be notified in advance of the precise issues to be raised in the hearing. *In re Ruffalo*, 390 U.S. 544, 550-51, 88 S.Ct. 1222, 1225-26, 20 L.Ed.2d 117 (1968); *Navato v. Sletten*, 560 F.2d 340, 345-56 (8th Cir. 1977); *Camacho v. Bowling*, 562 F.Supp. 1012, 1020-22 (N.D.Ill.1983).

The district court found that the notices of claims adjudicator's interviews were "filled out in such a perfunctory fashion that the claimant could not know why he had been summoned." 625 F.Supp. at 625. The court, however, did not find this practice unlawful

because it found that the record was insufficient to permit it "to determine in what percentage of cases the form is filled out improperly." *Id.* In order to establish the state's liability under 42 U.S.C. § 1983, the plaintiffs had to show that IDES had a "custom or usage" of sending deficient notices. *See Monell v. Department of Social Services*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 870 (7th Cir.1983). "Informal actions, if they reflect a general policy, custom, or pattern of official conduct which even tacitly encourages conduct depriving citizens of their constitutionally protected rights, may well satisfy the amorphous standards of § 1983." *Id.*; *Webster v. City of Houston*, 689 F.2d 1220, 1226 (5th Cir.-1982). It is also true, however, that

> the mere allegation of a single act of unconstitutional conduct by a municipal

> employee will not support the inference that such conduct was pursuant to official policies. On the other hand, where the plaintiff alleges a pattern or a series of incidents of unconstitutional conduct, then the courts have found an allegation of policy sufficient to withstand a dismissal motion.

Powe v. City of Chicago, 664 F.2d 639, 650 (7th Cir.1981). "'The frequency and pattern of the practice alleged to be a custom or usage must be sufficient to give rise to a reasonable inference that the public employer and its employees are aware that public employees engage in the practice and do so with impunity.'" *Webster*, 689 F.2d at 1226 (citing Schnapper, *Civil Rights Litigation After Monell*, 79 Colum.L.Rev. 213, 229 (1979)).

The parties stipulated that the sample of claims adjudicators' files was of a

sufficient size to draw ninety-five percent confident conclusions to within plus or minus three percent accuracy. Notices of claims adjudicators' interviews often were generated by computer. A list of computer-generated notices drawn from the sample claims shows that none of these notices told claimants that the issue of their interview would be whether they had impermissibly restricted their work search, and none informed claimants that they had violated a rule of thumb. Because of the parties' stipulation as to the accuracy of the conclusions drawn from the samples, it appears that none of the claimants who received computer-generated notices received adequate written notice as to the issues to be raised at the claims adjudicator's interview. The plaintiffs introduced evidence from which the district court could have found that from eighteen percent to twenty-four percent of the handwritten FSC notices were deficient,

and that twenty-two percent to twenty-eight percent of the handwritten EB notices were deficient.

There is no clear consensus among the courts as to what level of frequency of the challenged conduct evidences a custom, except that it must be more than one instance. It was not necessary for the district court to determine a precise percentage of deficient notices. The plaintiffs needed only to show, by a preponderance of the evidence, that the state had a custom of sending inadequate notices. Our finding that the computer-generated notices were deficient, combined with the examples of deficient handwritten notices and the testimony of one witness that "he was instructed by his superior to omit details in order to complete more notices per day," 625 F.Supp. at 639, are sufficient to establish custom. We find that the district court's statement as to the inadequacy of the

record to permit this conclusion is clearly erroneous.

The defendants assert that whatever deficiencies may have existed in the written notices were cured by appeal procedures available to claimants after they were denied benefits by the claims adjudicator. The district court found that because "a claimant in Illinois gets two oral hearings, and the deficient notices affect only the first" there was no constitutional notice problem. 625 F.Supp. at 639. Aside from the fact that the plaintiffs challenged both sets of notices, this position fails to recognize that notice should be provided "at a meaningful time." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). The Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), outlines three factors for courts to consider when determining the requirements of due

process in various situations. These factors are

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S.Ct. at 903. The court in *Camacho v. Bowling*, 562 F.Supp. 1012 (N.D. Ill.1983), considered these three factors in the context of regular unemployment benefits. The court found, and we agree, that the significance of these benefits to claimants whose "source of steady income which supports

family, health, and home has disappeared ... cannot be overstated." *Id.* at 1024. The risk of erroneous deprivation is great here because, to the extent that claimants were not apprised of the rules of thumb, it is extremely unlikely that they would be able to correctly answer the hypothetical questions on the claimant questionnaires, or to modify their work searches accordingly. The state cannot be said to have an interest in depriving unwitting claimants of benefits to which they may be entitled, and the burden of modifying its procedures to give claimants adequate notice of the rules they have violated before they come before the claims adjudicator is slight. Considering all of these factors, we believe that due process requires the state to provide claimants with notice of exactly how their work searches have been inadequate *before* the claimants must face the claims adjudicators. As the district

court observed, "[e]veryone is entitled to know what he has supposedly done wrong, for otherwise he cannot make an intelligent presentation at a hearing." 625 F.Supp. at 638.

This requirement will be of little help to plaintiffs, however, unless they are also informed of IDES's rules of thumb at the outset of their work searches. *See Carey v. Quern*, 588 F.2d 230, 232 (7th Cir.1978). Although the district court found "the rules IDES uses are not secret," 625 F.Supp. at 638, this finding was based on the fact that the Board of Review's decisions, presumably applying the rules, are available to the public in a digest maintained by IDES. *Id.* at 626. The district court also found that IDES had a manual of benefits decisions containing "important decisions of the Board." *Id.* The digest did not exist during the operation of the EB and FSC programs. It was

not published until September, 1985, pursuant to the consent decree in *Welch v. Bowling*, 79 L. 16004 (Circuit Court of Cook County, May 14, 1984, *amended* May 30, 1985, *amended* Feb. 19, 1986). The basis of the complaint in *Welch* was that the digest's precursor, the manual of benefits decisions, had not been available to the public. *Id. Welch* settled before that issue could be resolved. The district court did not specifically find that the manual was available to the public, only that it existed. If the district court's finding that the IDES's rules are not secret is based on the belief that the digest was available during the times in question, the finding is clearly erroneous. And if it is based on the belief that claimants had access to the manual, then the finding has no support in the record. If the manual is indeed available to the public, the defendants should

be able to demonstrate its availability on remand.

The district court also found that IDES furnished claimants with "written notices of the general requirements of the program and supplie[d] oral explanations of the notices." 625 F.Supp. at 638. The written notices tell claimants to expand their work searches and accept any work paying more than minimum wage that is within their physical and mental abilities. The FSC notice tells claimants about the five-contracts-per-week rule. The EB notice does not. The court found that the notices told claimants what they needed to know "without a level of detail that might have made the forms even more difficult to comprehend than they are." *Id.* at 639. To the contrary, the notices only hinted at the requirements imposed by the five rules of thumb. It would have been no more difficult for IDES to set out a checklist of the rules

of thumb than it was for the state merely to allude to the requirements and trust the claimants to infer from the notices' general language five specific rules.

Although the EB and FSC notices advised claimants to relax their wage demands, shift preference, travel time and other job search restrictions, and to seek any work within their capabilities, the claimants were not told that they could be denied benefits if, for instance, they said they were willing to travel forty-five minutes instead of one hour.

The defendants argue that the programs' eligibility requirements were restated orally to claimants by IDES technicians, who were also willing to answer whatever questions claimants had. This argument is not supported by the record, however. One technician testified that he explained to claimants about travel time and shift requirements, but another testified that she offered no informa-

tion beyond that in the printed notice. A third technician initially testified that she gave claimants additional information, but she was impeached on cross-examination by her earlier deposition testimony.[7]

The district court's finding that some technicians "volunteered information beyond that on the notices," 625 F.Supp. at 639, was not clearly erroneous. The defendants, however, are misguided in their reliance on this finding to support their argument that IDES personnel cured whatever defects existed in the written notices as to claimants' responsibilities for their work searches. The defendants may be able to establish that claimants were adequately informed of the EB and FSC work search requirements; they will have the opportunity to do so on remand.

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[7] This technician repeated her direct testimony on cross-examination.

Because the plaintiffs argue that claimants received inadequate written and oral notice of their work search responsibilities, their position is that claimants have no knowledge of the requirements until they meet with a claims adjudicator, after they have completed two weeks of searching for work and submitted their questionnaires. The questionnaires referred to claimants' efforts in the preceding two weeks, and claimants could not change answer after they were submitted. Therefore, if a claimant's answers were "wrong," he lost benefits for those two weeks and became ineligible for future benefits.

The defendants argue that the EB and FSC programs were like regular benefits in that claimants would file an initial claim during the first two weeks of eligibility and have a benefit rights interview at that time. The defendants ask us to take judicial notice of an Illinois Department of Labor office

bulletin stating that claims adjudicators may not date a claim earlier than the first day of the week the claimant reports to file a claim. This bulletin, defendants assert, renders impossible the situation in which claimants learn of the rules when it is too late to do anything more to comply with them. We note in passing that this argument assumes that technicians at the benefit rights interviews inform claimants of the rules, which the defendants have not yet demonstrated. Although we decline to take judicial notice of this bulletin at this juncture, defendants will have an opportunity to argue this point on remand.

IV.

We find that plaintiffs at this stage of the trial have shown by a preponderance of the evidence that IDES violated their due process rights by failing to provide them with adequate notice of the work search rules of

thumb and th precise issues to be determined by the adjudicators. As we noted earlier, this failure to meet constitutional standards of due process also violates the "fair hearing" clause of the Social Security Act, 42 U.S.C. § 503(a)(3). Because the district court terminated the trial after the plaintiffs presented their case, we remand to give the defendants an opportunity to rebut the plaintiffs' evidence and for such other purposes as may be appropriate. The district court's rulings on the statutory issues (with the exception of those under the "fair hearing" clause of the Social Security Act) are affirmed. Circuit Rule 36 may not apply on remand but shall be at the option of the judge who presided at the trial. We also leave to the original trial judge's discretion, should he preside on remand, whether to resume the trial from the point at which it was ended, or rehear the plaintiffs'

evidence on the constitutional issues. In so holding we do not intend to convey any view as to the appropriate final outcome of this case after the trial is concluded.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR ADDITIONAL PROCEEDINGS IN ACCORDANCE WITH THIS OPINION.

APPENDIX

GAL 21-81, section III (issued May 12, 1981).

III. *EB Eligibility Requirements*

Under P.L.96-499 claimants must meet the following requirements:

A. *Active Search for Work*. An EB claimant is expected to make a more diligent and active search for work than would normally be required of an individual receiving regular benefits. To meet EB eligibility requirements the claimant's search for work must be "systematic and sustained." A "sustained" effort to obtain work is a continual effort maintained at length throughout each week.

Under the requirement to actively seek work, passive availability for work is not sufficient. A "systematic" effort to obtain work is a work search conducted with thoroughness and with a plan or methods to produce results. Registration with a referral union will be considered as partially meeting the active search for work requirements, but individual work search efforts will be required in every case to demonstrate an active search for work. SESAs shall advise all EB claimants of the work search requirements they must meet each week to demonstrate an active search for work. If there are no or few openings in an individual's customary occupation, he/she must broaden the types of work sought to meet the "active" search for work requirement even if the claimant's job prospects are classified as "good." The broadening of types of work sought to include work other than the claimant's highest skill or customary work

must be accompanied by a willingness by the claimant to lower his/her wage expectations. Claimants who restrict their job search to their customary occupation as a mere preference, not based upon physical or mental capability or conditions of the labor market, and by this limitation fail to maintain an active search for work will be ineligible for extended benefits for failing to actively seek work. In determining whether the individual has met the active search for work requirements, where the openings in an individual's customary occupation are few or nonexistent, the SESA shall consider:

a. Available Job -- hiring patterns

b. Economic Activity -- labor market

c. Claimant's Physical and Mental Ability

SESAs must monitor each EB claimant's continuing eligibility in light of the special active

search for work requirements. This monitoring can be done effectively through:

-- Eligibility Review Interviews

-- Development of work search plans specifying actions to be taken by claimants

-- Comparison of reported work search contacts with actions specified in work search plan

-- Evaluation of adequacy and appropriateness of work search contacts

-- Verification of work search contacts

States which either do not now require tangible evidence of an active search for work for each week claimed or which require only employer name, address and results, should modify procedures to ensure that "tangible evidence" of a "systematic and sustained" work search is provided by claimant. A record of the following information is both helpful to those searching for work and necessary to claims staff who must determine that the

claimant's search for work is "systematic" and "sustained."

1. Employer name and address

2. Method of contact (unions, ES referral, phone, in person, specify other)

3. Name of person contacted

4. Date of contact

5. Type of work sought

6. Result of contact

7. Was an application taken?

...

In determining the adequacy of work search information required of EB claimants, the adequacy of currently required information should be evaluated against the information specified above. As a minimum, it is recommended that the "tangible evidence" required to determine if a claimant's efforts are "systematic and sustained" include items 1 through 7.

Exception: An EB claimant who is in a State-approved training program during any week for which EB is claimed will be exempt from the work search requirements. This exception for such claimants accords with the requirements in Section 3304(a)(8), FUTA, which prohibits denial of benefits by reason of an active search for work requirement when the individual is in such a training program.

Claimants must provide "tangible evidence" of a "systematic and sustained" search for work during each week claimed. SESAs must establish standards based upon their knowledge of the labor market of what constitutes a "systematic and sustained" search for work for the various labor market areas within the State. The EB claimant's "tangible evidence," report of work search activities must be reviewed and screened for each week claimed in accordance with the established standards.

When the review and screening of an EB claimant's work search indicates possible ineligibility because of a failure to actively seek work, the claimant's eligibility must be determined under the EB actively seeking work provisions.

The amount of effort expended and the number of employer contacts required during a week to demonstrate a "systematic and sustained" effort to obtain work will vary by labor market areas within a State. The number of employers a claimant is expected to contact to show he/she is actively seeking work depends on many factors, such as the number of employers and employment opportunities in a local area, the geographical size of the local labor market and the availability of transportation.

Therefore, the forms and methods employed by States to obtain "tangible evidence" of a "systematic and sustained" search for work

must be designed with space for a sufficient number of entries of work search contacts to accommodate the variations in employment opportunities and size of the various local labor market within a State. States should design their report of work seeking activities form with space for the entry of the maximum number employer contacts required to demonstrate a "systematic and sustained" search for work in the largest labor market area in the State.

B. *Job Prospects Classification.* It is intended that EB claimants be considered differently than claimants of regular benefits because of the duration of their unemployment. When claimants file an initial claim for EB their prospects for obtaining work in their customary occupation shall be considered not good, unless they can furnish evidence satisfactory to the SESA that their prospects

for obtaining work within a reasonable short period (4 weeks) are good.

The SESA should advise each EB claimant whose prospects for reemployment are not good that he/she will be subject to EB suitable work provisions. Under the EB provisions any work which is within the individual's capabilities is considered suitable work.

C. *Referral for Job Placement*. All EB claimants whose job prospects have been determined to be "not good" must be referred immediately for registration and referral to any suitable jobs fitting the EB suitable work definition. EB claimants previously registered with the Job Service whose prospects are "not good" must have their registration updated to reflect EB status since EB suitable work provisions are applicable. SESAs must establish procedures for forwarding and exchanging information for the adjudication of EB claims issues regarding:

1. Refusal of job offers;
2. Refusal of referrals;
3. Able and Available issues;
4. Results to report and other issues;
5. Failure to report and other issues;

Such information must be documented and where appropriate accompanied with supportive evidence to assist the adjudication process.

D. *Failure to Apply for or Accept Suitable Work*. If a claimant determined to have good prospects of obtaining work in his/her customary occupation within a reasonably short period fails to apply for or accept suitable work, the claimant's eligibility to receive benefits would be determined according to the standards and criteria applied under the State law to determine eligibility for regular benefits.

When an individual's prospects of obtaining work in his/her customary occupation are classified not good and the individual has

refused to apply for or accept work which he/she is capable of performing, the suitability of the work will be determined according to the standards and criteria applicable to extended benefits.

If the individual's job prospects have been found to be *not good* and the individual has refused to accept or apply for work suitable under the EB provisions, the EB disqualification would be subject to the following restrictions:

1. The gross average weekly pay for the offered work must exceed the individual's weekly benefit amount, plus any supplemental unemployment benefits (SUB) payable.

2. The job must have been offered to the individual in writing or listed with the SESA.

3. The pay must equal or exceed the higher of the minimum wage under section

6(a)(1), the Fair Labor Standards Act of 1938, or any applicable State or local minimum wage.

4. The work must have been suitable under all suitable work provisions for regular benefits which do not conflict with the special EB provisions. Under this provision for example, the offered work must meet the labor standards requirements of the State law. If an individual fails to apply for or accept suitable work, he/she shall be ineligible to receive EB for the week in which such failure occurred and continuing for the duration of his/her unemployment until such time as the individual has worked in employment during at least 4 weeks and has earned not less than 4 times his/her weekly benefit amount and is determined to be otherwise eligible.

The question of whether an issue exists and whether determinations would be in order when claimants do not file claims for weeks during which they failed to apply for or accept an

offer of suitable work would be governed by applicable State law.

The following examples should provide guidance in resolving EB work refusal issues when the claimant's job prospects are "not good" and the regular benefit disqualification would not apply:

1. An individual will be disqualified from receiving EB if he/she refuses suitable work which was offered in writing or listed with the SESA.

2. An individual will be disqualified if he/she refuses a referral to a job by the SESA (listed) but not offered in writing by an employer provided the offer of a referral meets other conditions for imposing a disqualification.

3. An individual will be disqualified from receiving EB for refusing to accept a job offered in writing by an employer but which is not listed with the SESA.

4. An individual will not be disqualified from receiving EB for refusing a job which is neither offered in writing nor listed with the SESA.

E. *Eligibility Program (ER)*. It is expected that individuals who are in EB have been through eligibility review and will continue to receive intensified services in this program.

F. *Active Search for Work*. To be eligible for EB, claimants are required to actively seek work. When it is determined that an individual has not been actively seeking work during a week, the SESA shall issue a determination holding the individual ineligible to receive EB for such week and until the individual has had employment during at least 4 weeks and has received remuneration for such employment not less than 4 times the individual's weekly benefit amount.

A determination would not be required if the claimant does not file a claim for the week(s) during which he/she did not make an active search for work. However, the individual's eligibility should be carefully considered if the claim is reopened and the claimant files for subsequent weeks of unemployment.

The requirement that individuals "actively engage in seeking work" is applicable to all claimants with respect to each week of unemployment for which extended benefits are claimed after March 31, 1981. An individual who does not seek work during a week because he/she was unable to work or unavailable for work for some compelling or uncontrollable reason not related to active search, is subject to the requirement to "actively" seek work to the same extent as all other EB claimants. If the individual does not meet this requirement, the disqualification for

failing to actively engage in seeking work must be imposed.

The laws of some States provide that a claimant continues to be eligible if he is unavailable because of illness or disability occurring after filing a claim and registering for work if no offer of work that would have been suitable at the time of registration is refused after the beginning of such disability. Under such circumstances an individual in EB status must still make an active search for work and will be subject to a disqualification as specified above for failing to actively seek work.

G. *Requalification Following Disqualification*. An individual subject to a disqualification in connection with the benefit year of the parent claim or during a period of EB eligibility as the result of voluntarily leaving employment, discharge for misconduct or the refusal of suitable work will eligible

for EB only if the disqualification is lifted under State law provisions which require employment subsequent to the date of the disqualification.

Irving O. COSBY, et al., Plaintiffs,

v.

Sally WARD, et al., Defendants.

No. 83C3116.

United States District Court,
N.D. Illinois, E.D.

Dec. 30, 1985.

OPINION

EASTERBROOK, Circuit Judge.*

Illinois administers three programs of unemployment compensation. The first program, regular benefits, affords unemployed people compensation for 26 weeks, unless before then the total payments equal the insured wages during a base period. Illinois pays these benefits out of taxes collected from employers. Ill.Rev.Stat. ch. 48 §§ 300-820 (IUI Act). The second program, extended benefits or EB, becomes available if unemployment in

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* Of the Seventh Circuit, sitting by designation.

the state exceeds a trigger level. People who have exhausted regular benefits are eligible for extended benefits for up to 13 weeks, if they are available in the state at the time. This program is paid for from state funds, but the federal government reimburses the state for 50% of the cost of this program under § 204 of the Federal-State Compensation Act of 1970, 26 U.S.C. § 3304(a)(11) note (EUC Act). The third program, federal supplemental compensation (FSC), is designed for people who have exhausted eligibility for regular and extended benefits. The maximum period of benefits under the FSC program is between 10 and 26 weeks. The FSC program does not require a trigger, and the federal government pays all FSC benefits under the Federal Supplemental Compensation Act of 1982, 26 U.S.C. § 3304(a)(11) note (FSC Act). The federal government also compensates the states for administering the EB and FSC programs.

See 42 U.S.C. §§ 501, 502, and 1101(c)(1)(A), and § 604(c) of the FSC Act.

The federal money has strings attached. The state must follow requirements laid down in the federal statutes and the interpretations of these statutes by the Department of Labor. The state has signed a contract with the Department pledging to abide by the rules under the FSC program. One string requires claimants to search for work. People who claim EB must "actively engage in seeking work". EUC Act § 202(a)(3)(A)(ii), IUI Act § 409K(1)(b). This means that they must provide state agencies with "tangible evidence" that they have engaged in "a systematic and sustained effort to obtain work." EUC Act § 202(a)(3)(E)(i) and (ii). The FSC program uses the same standards. FSC Act § 602(d); IUI Act § 409K(5)(a). None of the statutes defines these terms.

This case is a class action challenging Illinois's administration of the requirement that claimants actively search for work. The plaintiffs are frustrated claimants and putative beneficiaries of the EB and FSC programs. The defendants include the state officials responsible for administering the programs of unemployment compensation, the United States Department of Labor, the Secretary of Labor for Employment and Training. Judge Marshall, to whom this case was initially assigned, certified classes of applicants for EB and FSC benefits. He also concludes that the court has jurisdiction. The defendants have renewed their jurisdictional objections, but the law of the case is otherwise.

The parties stipulated almost all of the important facts. I adopt all of the propositions of fact in the stipulation, which runs more than 80 pages. My opinion abbreviates

some of these facts, and to the extent compression produces inaccuracy the stipulation controls. The care with which the parties drafted the stipulation reduced the length of the trial. The plaintiffs presented evidence on October 15 and 16, 1985, concerning the implementation of the search requirement. The defendants' evidence would have consumed another two days, but I stopped the trial under Fed.R.Civ.P. 41(b), which provides that at the close of the plaintiff's case in a bench trial the judge "as trier of the facts may determine them and render judgment against the plaintiff." I gave an oral opinion explaining why the defendants were entitled to judgment. At the same time, however, I called for briefs on the question whether certain interpretative regulations of the Department of Labor bound the State of Illinois. I was prepared to resume the trial,

but the briefs did not upset my conclusion. Judgment will be entered for the defendants.

Part I of this opinion summarizes the stipulated facts and contains my findings of fact based on evidence at trial. I have exercised the privilege under Rule 41(b) to find the facts on the basis of the plaintiffs' case. A judge who heard from the defendants might find the facts differently, but because any change would be in defendants' direction this would not assist the plaintiffs. Part II discusses the plaintiffs' principal contention -- that the procedures used in Illinois violate federal law and the implementing letters circulated by the Department of Labor. Part III considers a series of constitutional arguments.

I.

1. A person claiming EB or FSC benefits in Illinois is entitled -- or condemned, depending on one's perspective -- to five

levels of review. After a person has exhausted his entitlement to regular benefits, a claims technician at the local office of the Illinois Department of Employment Security (IDES) informs the person of the possible availability of further benefits. The claims technician gives the person a notice, written in English, appropriate to the program in question and explains the meaning of the notice. Many claims technicians are multilingual, and each local office has claims technicians who speak the languages of the local population; these technicians will explain the requirements in Spanish or Polish even though the notices are in English. The claims technician supplies each person with forms that must be filled in every two weeks. The person must use the form (the claimant questionnaire) to report what he has done during the last two weeks to find work; the questionnaire also requires answers to

questions such as "[w]hat is the lowest starting wage you will accept?" and "[h] long (in time) are you willing to travel each way to work?".

If the applicant's questionnaire contains satisfactory answers, and if he otherwise is entitled to benefits (for example, if he has weeks of eligibility remaining), the claims technician sends the claim on for payment. If an answer on the questionnaire raises doubts about eligibility, the technician circles the answer. Another employee of the local office sends out a form requiring the claimant to appear in person at the local office for a meeting with a claims adjudicator. This notice is supposed to alert the claimant to the problem, but frequently it is filled out in such a perfunctory fashion that the claimant could not know why he had been summoned. (The record does not permit

me to determine in what percentage of cases the form is filled out improperly.)

The adjudicator discusses the questionnaire with the claimant, finding out whether the claimant understood the questions and answers. The adjudicator does not coach the claimant on which answers are acceptable and which are not, but as a rule the adjudicator will accept oral retractions of the written answers. If, for example, the claimant says that he will travel 30 minutes each way to work, the adjudicator may discover that the answer represented the claimant's actual travel time to his last job rather than the maximum time the claimant will travel. In that event the adjudicator will find out the real maximum time and use this in his decision. An adjudicator also will allow the claimant to return home to obtain additional documentation, if that should be necessary to prove the number of visits to employers

in search of work. At the end of the interview the adjudicator often obtains a brief written statement from the claimant concerning new and significant answers. The adjudicator renders an immediate written decision on the claimant's eligibility for benefits. The reasons are apt to be brief -- a handwritten "He unduly restricts his availability under the FSC program: 1/2 hr travel ea way & $5 hr min wage" (claim of Andres Hernandez) is a typical decision.

A person may appeal an adverse decision of the adjudicator to a referee. Referees are appointed and supervised by people outside the local offices, which ensures that quirks in the local structure do not influence their decisions. Referees are lawyers. Like claims technicians and claims adjudicators, referees receive training on the nature of the program and its eligibility criteria. The training materials of all three include copies of the

bulletins circulated by IDES. None of the decisionmakers remembers all of these bulletins -- no surprise, because the bulletins in the record are hundreds of pages long, and I am confident that the parties have spared me hundreds of pages more on EB, FSC, and the many other programs the IDES administers. All of the technicians, adjudicators, and referees who testified were familiar with the general principles in the bulletins, even if they could not recall seeing a particular bulletin.

The claimant is entitled to file written reasons for the appeal, and the referee meets personally with the claimant. The referee will review the questionnaire with the claimant and again elicit the meaning of the answers. The claimant is entitled to present evidence, and the hearing is recorded. If the referee does not speak the claimant's language, the IDES provides an interpreter.

The referee makes a new determination; he is not bound in any way by the adjudicator's findings and decision. The appeal ends in another written decision, typically prepared the day of the interview. This is more formal than the adjudicator's opinion. In the case of Andres Hernandez, the referee's opinion is a little more than a page of single-spaced typing, containing a capsule history of the case, findings of fact, and conclusions. The referee's conclusion was:

> Based on the record as a whole, the Referee finds that the Claimant has not made an active, systematic and sustained search for work as required, by the Federal Supplemental Compensation Act. An active, systematic and sustained search for work is shown if: (1.) The Claimant conducts a work search for at least 3 days in a week resulting in at least 5 employer contacts. (2) The

> Claimant relaxes restrictions with respect to type of work, hours, rate of pay, and travel time and distance, and (3) the Claimant keeps a record of his efforts to find work e.g. indicating the name dates of contact and results. The Claimant failed to comply with (1), (2) and (3) of the aforementioned requirements. The Claimant failed to keep a credible record of his contacts for the period September 12, 1982 through September 18, 1982. Further there is no evidence to suggest that the Claimant contacted five (5) employers in at least 3 days of the weeks. The Claimant's forms indicate he was looking for work near his home.

If the referee affirms the denial of benefits, the applicant's next stop is the Board of Review. This is an administrative court within the IDES. The disappointed

claimant may file written protests and briefs, personally or by counsel, arguing all legal and factual questions. The Board renders a written decision based on the record made before the referee. In the case of Andres Hernandez, the Board stated the facts and then affirmed on a single ground: "In the case before us, the evidence shows that the claimant conducted his work search on three days of the second week of the period under review. The evidence does not show that the claimant conducted a work search during any other portion of the period under review. Under such circumstances, the claimant's work search was not active, systematic, or sustained as required by the Federal Supplemental Compensation Act." The board's decisions are not systematically published, but IDES maintains for itself and the public a digest of the Board's precedents. There is also a

manual of benefits decisions, which contains important decisions of the Board.

A person who is disappointed successively by claims technicians, claims adjudicator, referee, and Board may obtain review in the state courts. Ill.Rev.Stat. ch. 48 § 520, ch. 110 § 301 *et seq*. The plaintiffs have not challenged the adequacy of this review. By the time an unemployed person can obtain judicial review, however, the four levels of administrative review will have consumed many months.

IDES has an "Economic Information and Analysis Unit" that collects and disseminates information about labor markets in Illinois. It publishes a monthly newsletter with data on the state as a whole and selected cities and counties; quarterly publications supply information about smaller areas. But the Unit does not determine whether there are openings in particular occupations, and none of the

technicians, adjudicators, and referees who testified made any use of the data disseminated by the Unit.

The technicians, adjudicators, and referees also disregard the work of the Job Service, an agency that helps unemployed people find work. A claimant must register with the Job Service to be eligible for any form of unemployment compensation, and the claimant proposes to the Job Service a plan of search for new work. Counsellors at the Job Service, who should know where there may be openings for a person of the claimant's skills, assist in formulating the plan. But the counsellors at the Job Service do not ensure that plans comply with the work search rules administered by the unemployment offices, the people deciding whether to award benefits do not often see these plans, and compliance with a plan approved by the Job

Service will not assure eligibility for EB or FSC benefits.

The adjudicators, referees, and Board all try to determine whether the claimant met the requirement of active work search for work during the two weeks covered by the questionnaire. If the person did not, the IDES denies benefits even if it is convinced that the claimant will make an adequate search in a subsequent period. The denial, in turn, triggers a waiting period. Once a person has had a claim for an week rejected, he must find work and earn at least his average weekly benefit for four weeks before his is again eligible for unemployment benefits.

2. The EUC Act and the FSC Act require Illinois to limit EB and FSC benefits to people actively seeking work. The IDES has issued several bulletins to its staff (including the claims technicians, adjudicators, and referees). The principal bulletin concerning

the work search requirement of the EB program is Bulletin No. 1467, Supplement No. 1, issued August 20, 1981. This reproduces § 409 of the IUI Act, which among other things defines "suitable work" for EB purposes as "any work which is within [the claimant's] capabilities", provided that the gross average weekly wage must exceed the higher of the minimum wage and the amount of unemployment benefits to which the claimant would be entitled. The EUC Act requires a "systematic" and "sustained" search; Bulletin No. 1467 defines systematic as an effort "conducted with thoroughness and with a plan or method designed to produce results." It defines sustained as "a continual week-to-week effort maintained for whatever period of time [is] necessary to obtain work. Passive availability for work (merely registering with the Job Service, making telephone calls, looking for want ads, etc.) only without a continued

active effort to find work is not sufficient." The Bulletin defines two levels of prospects: "good," meaning that the claimant already has a job on which he is to start (or be recalled to work) within four weeks, and "not good," meaning every other situation. If a person's prospects are "not good," he must accept "[a]ny work which is within [his] physical and mental capabilities" provided that the wage is at least the legal minimum or the amount he could receive as benefits. The Bulletin continues (in section D):

> Due to the EB claimant's prolonged period of unemployment, it is intended that he be required to make a more diligent effort to seek work than would normally be required of an individual receiving regular benefits. Accordingly, the weekly eligibility of each EB claimant must be monitored in light of the special requirements concerning search for

work.... All EB claimants must be advised of the work search requirements that they must meet each week.... It is expected that the EB claimant's efforts to find work should increase because of the duration of his unemployment.

If there are no or few openings in the claimant's customary occupation, he must broaden the types of work sought to meet the active search for work requirement. Claimants who restrict their job search to their customary occupation, or who have other restrictions (i.e., wages, hours, travel, etc.) not based upon physical or mental capability, and by these restrictions fail to maintain an active systematic search for work, may be ineligible for extended benefits.

In determining whether the individual has met the active search for work

requirement, where openings in the individual's customary occupation are few or nonexistent, the following areas shall be considered.

a. Available Jobs -- Hiring pattern

b. Economic Activity -- Labor market

c. Claimant's physical and mental activity

...

The level of economic activity in the labor market area and the kinds of work available are important factors in determining whether a systematic and sustained work seeking effort is being made. Eligibility Review Program and Job Service information and any job counseling interviews as well as the results of aptitude testing would be pertinent.

The requirements of Bulletin No. 1467 are reflected in the form that claims technicians give to all applicants for extended benefits. This form tells claimants, among other things:

> ... You are expected to relax your restrictions with respect to the type of work you will accept, hours, rate of pay, travel time, etc. (for example: A senior accountant would be required to accept work as a junior accountant or bookkeeper, etc.) ... If there are no or few openings in your regular occupation, you are expected to seek any work within your physical and mental capabilities for which you have the background to perform. You must keep a record of your efforts to find work that include the following information:....

> You may use your usual methods of contacting potential employers (in-person contacts, registration with private employment agencies, reporting to your union as required, answering or placing want ads, resumes, telephone calls, etc.,). However, your work search must include some independent work search efforts each week.
>
> If you are not able to conduct an active search for work during a week due to compelling circumstances, you will be held ineligible only if you claim. It is your responsibility to inform the local office that you are not claiming a week for this reason.
>
> .... If you do not have a definite prospect of return to work in 4 weeks or less, your job prospect classification is "not good". If your classification is "not good", any work that is within

your physical and mental capabilities that you have the background to perform is suitable, provided that ... the gross average weekly wage exceeds your weekly benefit amount (plus any supplemental unemployment benefits paid to you by a former employer)....

If you fail to conduct an active search for work or you refuse to apply for or to accept suitable work ... you will be held ineligible for Extended Benefits for the week in which such failure occurred and for each week thereafter until you have worked in at least 4 weeks with earning in each week, which when totaled, equals at least 4 times your weekly benefit amount.

The EB program has been "off" in Illinois more than it has been "on." When the EB program is "off," or when it is "on" and a claimant's benefits are exhausted, the FSC

program is next in line. The principal instructions for the implementation of the FSC program are in Bulletin No. 1519 and its supplements. The original Bulletin No. 1519, dated September 15, 1982, simply states that the FSC program requires the claimant to seek work actively; no subsequent bulletin spells this out, but no bulletin suggests that the requirement has a different meaning than it does under the EB program.

The IDES wrote two notices for claimants under the FSC program. Only the second, which has been used since February 17, 1983, is now important. This handout lays down severe requirements for seeking work:

(1) On each normal working day you must do something positive to find work.

(2) .... You must make work contacts on at least 3 days per week, resulting in at least 5 employer contacts per week. This may mean looking for work beyond

your normal commuting distance as well as increasing one-way travel time. You are expected to lower your salary demands, even to the minimum wage, if there are no prospects of finding work in your customary occupation.

(3) If there is any day on which you made no employer contacts, you must indicate on the form what positive effort you made that day to find work, for example, preparing a resume, contacting a union or a professional organization, attending an employment seminar, etc.

(4) If your prospects for obtaining work in your usual occupation are poor (that is, if you do not have a *definite* offer to begin work within four weeks ...), you will be expected to accept any offer of suitable work that is listed with the State Job Service or offered in writing. Any work will be considered suitable if

you are reasonably fitted by training and experience to perform the work or if the necessary training is provided when you lack the required skills.

To be suitable, the gross pay of any work offered must exceed your weekly benefit amount plus any Supplemental Unemployment Benefits (SUB) you receive form your former employer, or the State or Federal minimum wage, whichever is greater.

The law provides for the denial of FSC to anyone who does not observe the above requirements. The disqualification will continue until the person has worked in at least four weeks and earned not less than four times his or her weekly benefit amount.

Neither the bulletins nor the notices establish bright-line rules other than the three day -- five contract rule in the notice given to FSC claimants and the wage rule that

is part of the definition of "suitable" work. A substantial part of the plaintiffs' argument is that the IDES nonetheless used rules of thumb. On the basis of the plaintiffs' evidence, I conclude that the IDES did this. (A caveat, repeated for the last time: defendants' evidence may have put this in a different light.)

Many technicians, adjudicators, and referees testified that they used some rules of thumb. Claims technicians routinely flagged any questionnaire on which the claimant did not answer at least one hour to the question asking for maximum one-way travel time. If the claimant limited his search to day shift work (sometimes even to day and evening shifts), that too was flagged. Any wage significantly over the minimum was flagged, as was any search for employment other than by personal visits to employers' places of business. If subsequent questioning

by an adjudicator or referee revealed that the claimant indeed would not travel, say, more than 45 minutes each way to work, or would not work the evening shift, that led to a conclusion that the claimant had not engaged in an adequate search for work.

The adjudicators and referees testified that these rules of thumb were not absolute necessities. For example, if the claimant was seeking work as a lawyer, he would be allowed to use the methods of seeking work customary in the occupation; walk-in visits would not be required. But the witnesses apparently relaxed their presumptive rules but rarely. I have reviewed many of the files contained in the record, and case after case contains notations like those in the Hernandez file -- claim denied because of a limitation on travel time such as 1/2 hour, or a demand for $5 per hour in wages.

The plaintiffs also established that the adjudicators and referees do not go behind the claimants' answers. That is, if the claimant, when asked, said that he would not take a job for less than $5 per hour, the referee would accept that as accurate. There are other ways to determine what wage the claimant demanded. The referee might, for example, look at the applications for employment the claimants filled out, to determine what wage they wrote down. Or if the referee knew that the claimant had applied for a particular job at a particular plant, the referee might find out the wage of that job. Similarly, the referee might find out how long it would take the claimant to reach a particular place at which he had applied for work. Neither adjudicators nor referees pursued such collateral methods of determining the restrictions the claimants placed on their search for work. Some decisionmakers testified that

they could figure these matters out from their knowledge of Chicago's geography and labor market, but none testified that he did this regularly.

Finally, the plaintiffs established that the decisionmakers at the IDES do not regularly use any systematic information about the labor market or job openings. They do not know which occupations have "few or no openings"; they do not know anything systematic about levels of economic activity. This is not to say that they know nothing. The decisionmakers testified, and I find, that they could deduce much from the people who come before them. By recalling the occupations of the claimants, they can tell which occupations seem to be producing a lot of unemployment. Similarly, they can tell much about the "prospects" of an applicant, and about conditions in his occupations, by determining how long the applicant has been

unemployed. If one steelworker has been unemployed for 50 weeks, this says a great deal. The decisionmakers at the IDES see a parade of claimants and can draw astute inferences even though they do not study data prepared by professional students of labor markets.

My finding that the decisionmakers at the IDES do not use any systematic information about job openings in particular occupations, or about levels of economic activity, is limited to the kind of cases discussed at trial. The principal use of these data is in evaluating claimants with "good" prospects, who are free to restrict their search for work in certain ways, and people who may have mental or physical restrictions. None of the evidence at trial concerned claimants with "good" prospects or with handicaps of any sort.

The plaintiffs also established that the local offices of the IDES were not entirely consistent in the administration of the programs. Shortly after the beginning of the FSC program the supervisor of one office made it clear that the adjudicators and claims technicians were not to be liberal in granting benefits, and he held a follow-up meeting to drive the point home. Technicians and adjudicators from this office who testified stated that they interpreted the directive as one to hold the claimants to their answers on the questionnaire, to ask no leading questions (that is, not to hint that the questions may have been misunderstood and that other answers may be more helpful), and to apply mechanical rules (such as a minimum travel time of one hour each way). These people also testified, however, that they followed the rules in the IDES bulletins; they complied with their supervisor's wishes by

beady-eyed adherence to the rules, an effective bureaucratic technique. Within two months the supervisor at this office reversed field and said that too many claims were being denied; the staff then stopped being so strict. This incident plays no role in my decision. The plaintiffs want injunctive relief. An incident of this character does not inform the appropriate operation of the unemployment system in the future, for any system is open to misunderstanding, overbearing supervisors, and other human foibles. The differences among offices, other than this single incident, are insignificant. Moreover, the referees of IDES answer to different supervisors, so the claimants at this office could have had de novo review by other officials of the IDES.

3. The United States Department of Labor administers the EUC Act and the FSC Act for the federal government. The statutes do

not grant the Department any particular powers, but it must assess state programs to see whether they comply with the statutes (and therefore whether the states should be reimbursed). The EUC Act requires states to enact statutes containing the federal rules; § 409 of the IUI Act complies with that requirement. The FSC Act contemplates contractual arrangements between states and the federal government. Illinois and the Department signed such a contract in September 1982. The state promised among other things to "perform all of the functions and duties ... in accordance with the [FSC] Act as interpreted by the Secretary of the Department of Labor."

The Department has not promulgated any regulations concerning the administration of the two acts. It has offered plenty of advice, however, in the form of "general administration letters" (GALs) and "unimploy-

ment insurance program letters" (UIPLs). These documents are addressed to "all state employment security agencies." They are sometimes published in the Federal Register, but they are not regulations because they are not circulated for notice and comment before adoption by the Department. The Department occasionally makes advanced copies of the GALs available to state agencies, but his practice apparently is designed to give extra notice rather than to elicit comments. One UIPL in the record expired before its official date of issuance, so the practice of "advance" circulation may be essential. At all events, I conclude that the addressees of the GALs did not have the sort of personal service that would permit the documents to be treated as regulations in the absence of published notice and opportunity for comment. 5 U.S.C. § 553(b).

The most recent missive concerning the FSC program is UIPL 7-84, published at 49 Fed.Reg. 4271 (Feb. 3, 1984). This lays down requirements for each state to follow, and its treatment of the seeking work requirement is terse. It simply restates the requirement that people actively seek work and provide tangible evidence that they have done so. 49 Fed.Reg. 4275-76. If this is the Department's controlling word, it is no guidance at all. An earlier GAL, however, was more informative. GAL 2-83, issued November 2, 1982, and published at 47 Fed.Reg. 54706 (Dec. 3, 1982), states that the seeking work requirement under the FSC Act is the same as that under the EUC Act. GAL 2-83 as the definitive word on the FSC Act, and I shall do likewise.

GALs 21-81 and 22-81 are apparently unpublished. GAL 22-81 is a question-and-answer sheet explaining GAL 21-81. So the

only authoritative construction of the seeking work requirement turns out to be GAL 21-81, which was not circulated for advance comment, let alone published. Pages 8-13 of GAL 21-81 describe the requirement in terms similar to those in the IDES's bulletins. Because the text of GAL 21-81 is not published anywhere, I set out the more important language from Part III:

> A. *Active Search for Work.* An EB claimant is expected to make a more diligent and active search for work than would normally be required of an individual receiving regular benefits. To meet EB eligibility requirements the claimant's search must be "systematic and sustained." ... [P]assive availability for work is not sufficient....
>
> ...
>
> If there are no or few openings in an individual's customary occupation, he/she

must broaden the types of work sought to meet the "active" search for work requirement even if the claimant's job prospects are classified as "good." The broadening of types of work sought to include work other than the claimant's highest skill or customary work must be accompanied by a willingness by the claimant to lower his/her wage expectations. Claimants who restrict their job search to their customary occupation as a mere preference, not based upon physical or mental capability or conditions of the labor market, and by this limitation fail to maintain an active search for work will be ineligible for benefits for failing to actively seek work. In determining whether the individual has met the active search for work requirements, where the openings in an individual's customary occupation

are few or nonexistent, the SESA [state employment agency] shall consider:

a. Available Jobs -- hiring patterns

b. Economic Activity -- labor market

c. Claimant's Physical and Mental Ability

SESAs must monitor each EB claimant's continuing eligibility in light of the special active search for work requirements. This monitoring can be done effectively through:

-- Eligibility Review Interviews

-- Development of work search plans specifying actions to be taken by claimants

-- Comparison of reported work search contacts with actions specified in work search plan

-- Evaluation of adequacy and appropriateness of work search contacts

-- Verification of work search requirements

States which either do not now require tangible evidence of an active search for work for each week claimed or which require only employer name, address, and results, should modify procedures to ensure that "tangible evidence" of a "systematic and sustained" work search is provided by the claimant....

....

... SESAs must establish standards based upon their knowledge of the labor market of what constitutes a "systematic and sustained" search for work for the various labor market areas within the State....

....

The amount of effort expended and the number of employer contacts required during a week to demonstrate a "systematic and sustained" effort to find work will vary by labor market areas within a State. The number of employers a claimant is expected to contact to show he/she is actively seeking work depends on many factors, such as the number of employers and employment opportunities in a local area, the geographical size of the local labor market and the availability of transportation.

....

B. *Job Prospects Classification*.... When claimants file an initial claim for EB their prospects for obtaining work in their customary occupation shall be considered not good.... The SESA should advise each EB claimant whose prospects for reemployment are not good that he/she

will be subject to EB suitable work provisions. Under the EB provisions any work which is within the individual's capabilities is considered suitable work.

....

D. *Failure to Apply for or Accept Suitable Work*.... If the individual's job prospects have been found to be *not good* and the individual has refused to accept or apply for work suitable under the EB provisions, the EB disqualification would be subject to the following restrictions:

1. The gross weekly pay for the offered work must exceed the individual's weekly benefit amount, plus any supplemental unemployment benefits (SUB) payable.

2. The job must have been offered to the individual in writing or listed with the SESA.

3. The pay must equal or exceed the higher of the minimum wage under section 6(a)(1), the Fair Labor Standards Act of 1938, or any applicable state or local minimum wage.

These requirements were the basis of the bulletins and notices the IDES issued concerning the EB and FSC programs. Gregory Ramel, who wrote or supervised the preparation of the IDES bulletins, so testified. The plaintiffs nonetheless say that the IDES has not complied with the federal directives, and that these directives preempt the rules the IDES has been using in practice. I turn to that argument.

II

The plaintiffs' claims are based on differences between GAL 21-81 and the Illinois practice, as I have found the IDES to administer the programs. Illinois uses rules of thumb such as the requirement to contact five

employers during three days of the week, the minimum time a person is willing to travel, and the shifts on which the person is willing to work. GAL 21-81 does not suggest the use of all of these mechanical rules, although it does support the requirement that each claimant reduce his wage demand to the greater of the minimum wage or the weekly benefit amount. The GAL talks about "economic activity," "available jobs," and differences in the nature of labor markets; the Illinois bulletin mentions these things, but in practice the decisionmakers do not use them systematically. Finally, GAL 21-81 requires states to notify claimants of the requirements, and the plaintiffs say that the notices the IDES uses are not adequate. The plaintiffs insist that each difference makes the Illinois system defective.

The plaintiffs cast this as a simple preemption argument: the state uses one rule,

the federal government requires another, and under the Supremacy Clause the federal rule prevails. Federal regulations, like federal laws, preempt conflicting state laws and practices. *Jones v. Rath Packing Co.*, 430 U.S. 519, 536, 97 S.Ct. 1305, 1315, 51 L.Ed.2d 604 (1977); *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962). But not all pronouncements by federal agencies have the same weight. A regulation carries the force of law only if it implements power delegated to the agency and complies with the notices and comment requirements of the Administrative Procedure Act. *Chrysler Corp. v. Brown*, 441 U.S. 281, 312-16, 99 S.Ct. 1705, 1723-25, 60 L.Ed.2d 208 (1979); cf. *Production Tool Corp. v. Employment & Training Administration*, 688 F.2d 1161, 1166 (7th Cir.1982). A statement adopted with less formality may be persuasive; interpretative rules announcing the position of the responsible agency about

the meaning of a statute should be respected unless plainly mistaken. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 562-70, 100 S.Ct. 790, 795-99, 63 L.Ed.2d 22 (1980); *Industrial Holographics, Inc. v. Donovan*, 722 F.2d 1362, 1366 n. 6 (7th Cir.1983); *Smith v. Miller*, 665 F.2d 172, 179 & n. 7 (7th Cir.1981; but see *Mayburg v. Secretary of Health and Human Services*, 740 F.2d 100, 105-07 (1st Cir.1984). In the absence of a binding regulation, however, the statute alone is the source of authority, and unless the state's position conflicts with the statute it must be sustained.

GAL 21-81 is not a regulation. It has not been published, let alone published for comment in advance of its adoption. It therefore lacks the force of law. Now the plaintiffs say that I am forbidden to reach this conclusion. Until I raised the issue on the eve of trial, all of the parties

assumed that GAL 21-81 is a binding regulation, and the pretrial order does not list the status of GAL 21-81 as an issue for decision. The defendants' inattention to the nature of the GAL may have prevented them from raising the issue belatedly, but it does not stop the court from doing so. *Jahnke Construction Co. v. Vulcan Materials Co.*, 527 F.2d 772 (7th Cir.1976). Cf. Fed.R.Civ.P. 16(e); *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 153 (7th Cir.1981); *Sadowski v. Bombardier Ltd.*, 539 F.2d 615, 620-21 (7th Cir.1976). I have been asked to issue an injunction substantially altering the way Illinois administers the EB and FSC programs. The supposed source of authority for this injunction is GAL 21-81. Because GAL 21-81 is not a regulation, it supplied no authority for anything, and it would be a misuse of the power of the court to direct a state to change its conduct just because

the lawyers for the defendants neglected to inquire into the status of GAL 21-81.

GAL 21-81 applies to the EB program, but its rules have been adopted for the FSC program as well, and Illinois has promised by contract to follow the Department of Labor's standards for the FSC program. The contract therefore makes GAL 21-81 a binding construction of the FSC Act between Illinois and the federal government. The plaintiffs seek to take advantage of this contract, but they are not parties to it. Plaintiffs may use the contract only if there is a private right of action in favor of third party beneficiaries to contracts of this sort. No statute creates such a right of action or otherwise grants rights to the plaintiffs, so under cases such as *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979), they may not automatically

use the contract as a basis of a judicial order against the state.

D'Amato v. Wisconsin Gas Co., 760 F.2d 1474 (7th Cir.1985), holds that people claiming rights as third party beneficiaries under a contract between the federal government and some other entity must establish at a minimum that they are the principal beneficiaries of the contract. See also *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir.1981). People who are simply affected by a contract -- "incidental beneficiaries" in the argot -- may not use it as the basis of relief against the signatories. Even the intended beneficiary must establish, as in any other case involving implied private rights of action, that Congress meant to make the entitlement enforceable in court. *D'Amato, supra*, 760 F.2d at 1479-80. *D'Amato* held that a handicapped person may not enforce a clause in a contract, required by a federal statute, that

requires employers to have affirmative action programs for the handicapped.

The plaintiffs try to avoid *D'Amato* by contenting that they are the intended beneficiaries of the EB and FSC programs. This was true of the handicapped plaintiff in *D'Amato*, too, but at all events the plaintiffs are not especial beneficiaries of GAL 21-81. The plaintiffs may be the intended beneficiaries of the EB and FSC *programs*, but they are certainly not the intended beneficiaries of the *work search requirements*. The two statutes, as well as GAL 21-81, are designed to compel states to tighten up the administration of the unemployment programs, to deny benefits to people whose search for work was sufficient to qualify for regular benefits but not sufficient to qualify for extended benefits. The principles contained in GAL 21-81 are for the benefit of the federal government, which pays 50% of EB and 100% of

FSC benefits; the Department of Labor wanted to ensure that states were not too liberal with federal money. The statements in GAL 21-81 are not rules so much as they are grounds on which the federal government may choose to question the states' administration of the program. It is not possible to draw enforceable rights in favor of claimants from the language of GAL 21-81.

There remains the possibility that GAL 21-81 is a persuasive interpretation of the statutes, which directly preempt the practices now being used in Illinois. The statute requires a "systematic and sustained effort to obtain work" without suggesting that there is only one way to define "systematic and sustained". The GAL does not purport to construe the statutes or to lay down exclusive rules. It is a set of principles telling state agencies to be more restrictive and suggesting what may be restrictive enough.

A federal statute preempts state rules only if there is an irreconcilable conflict, and there is a presumption against conflict. E.g., *Jones v. Rath Packing, supra; Hillsborough County v. Automated Medical Laboratories, Inc.*, ___ U.S. ___, 105 S.Ct. 2371, 2376, 85 L.Ed.2d 714 (1985); *Metropolitan Life Ins. Co. v. Massachusetts*, ___ U.S. ___, 105 S.Ct. 2380, 2388-89, 85 L.Ed.2d 728 (1985). The statutes do not define "systematic and sustained;" GAL 21-81 does not give an exclusive definition or preempt any different approaches that may be equally effective in protecting the federal interests. The statutes are, after all, programs of cooperative federalism, and Congress almost always gives the states some leeway in programs of this sort.

The legislative history of the work search clauses does not suggest any rigid requirement. For example, the entire legisla-

tive history of the search requirement in the current version of the EUC Act is: "Extended benefits would be denied to any individual for so long as he or she fails to engage in a systematic and sustained effort to obtain work and fails to provide tangible evidence to the State Agency that he or she has engaged in such an effort." H.R.Conf.Rep. 96-1479, 96th Cong., 2d Sess. 164 (1980). This just repeats the language of the statute. It does not suggest that the search requirement creates any particular rights -- indeed any rights -- in favor of claimants.

The Department of Labor apparently is satisfied with the IDES's administration of the EB and FSC programs. It is a defendant, not a plaintiff. It has never suggested that Illinois is out of compliance with the GALs. Although the Department has also never suggested just what GAL 21-81 means, it has taken the position that the GAL does not mean

what plaintiffs think it does. Its brief asserts both that each applicant must formulate his own plan for searching and that a state agency need not make written determinations concerning the availability of work. "The logic behind not requiring such a written determination is simple. The fact that an individual has applied for EB or FSC is sufficient reason to believe that there are no or few openings in that individual's customary occupation." This, too, is a position a court must respect. Who knows better than the Department of Labor whether Illinois is in compliance with the Department's GALs? *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14, 65 S.Ct. 1215, 1217, 89 L.Ed 1700 (1945).

The Department may not adopt a silly construction of its rules, but it has not done

this. GAL 21-81 requires states to notify claimants of the work search rule; Illinois does this. Claims technicians give notices to the claimants and explain them orally. The notices give adequate warning that the requirements are strict, even though they do not mention each rule of thumb. Illinois insists that claimants expand their search by increasing the distance they will travel and the times they will work, and by reducing the wage they demand. The GAL does not forbid any of these; it probably requires them.

The GAL does not insist that the state take account of labor markets and job openings in any particular way. Take "hiring patterns" as an example. Perhaps the pattern in an industry is to hire those who apply in person for the night shift, and as the employee accumulates seniority he can move to a more favorable shift. A person who applies by telephone rather than in person, or who

insists on avoiding the night shift, is not being realistic. He is unemployed by choice, and, because the unemployment system assists only the involuntarily unemployed, the IDES may cut him off. An adjudicator can understand many things about hiring patterns without the benefit of formal, written determinations. The decisionmakers in Illinois use their understanding when acting, and nothing in the GAL suggests that the state must use professionally-developed statistics or written determinations as the sole base of decisions.

To the extent the plaintiffs rely directly on the statutes, rather than on GAL 21-81, they cannot prevail. The statutes require Illinois to tighten the standards; it did; the statutes do not establish how tight is too tight. The state's approach is consistent with the purpose of an enhanced work-search requirement. Regular benefits

last 26 weeks. If a person is unemployed at the end of 26 weeks, then (i) there is very little work in the economy the person can do; (ii) the person has not been seriously trying to find a job; or (iii) he has been too picky about what work he will do. The EUC Act and the FSC Act condition the award of further benefits on the claimant's willingness to look harder and be less choosy. The approach the IDES has adopted follows the path Congress has marked. True it is that this slights the possibility that (i) rather than (ii) or (iii) is the source of the unemployment, but Congress has decided to require people to search harder even if that turns out to be pointless at times.

By the time a person has been unemployed 26 weeks, he ought to be willing to accept a much lower wage, perhaps as low as the legal minimum; Illinois requires this. He ought to be willing to travel farther to work or

accept a job at odd hours; Illinois requires this. He ought to contact many employers; Illinois requires this too. Illinois achieves all of these things by bright-line rules, to which the plaintiffs object. But the statutes say nothing about the choice between bright-line rules and other approaches.

Illinois might be in trouble if it applied these rules to people with "good" job prospects or with physical or mental handicaps that made exhaustive searches for work either impossible or exceedingly unlikely to be rewarding. A sensible construction of the statutes would relax the search requirement for such people, and GAL 21-81 suggests as much. Knowledge of job prospects, economic activity, and the labor market would help to tailor a search requirement to the circumstances of these unusual claimants. But none of the evidence in this case concerns people

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whose prospects are "good" or who have physical or mental handicaps.

The IDES was entitled to require people who have not found work in their own occupations in 26 weeks of searching while on regular benefits to expand their occupational and geographic searches, to increase the number of applications for employment (and for many jobs no application other than a personal one if effective), and to reduce the minimum wages they will accept. The fact that they have not found work in 26 weeks or more is all the information about labor markets the state needs in most cases.

The plaintiffs protest that Illinois has taken a blunderbuss approach. Its rules of thumb disregard differences among applicants and occupations. When the decisionmaker accepts the claimant's verbal report about the time he will travel or the wage he will accept, this increases the risk of error.

Someone who has in fact sought work at 70-minute commute from home may think erroneously that the time is 45 minutes, and if he reports this as the maximum time he may be disqualified. Someone who answers $7 to the question "what is the lowest wage you will accept?" may mean to say only that $7 is the wage he would like to get; this person may have applied for jobs paying the minimum wage. So there are two sorts of problems in approach the IDES has taken -- the problems associated with categorical rules that may misclassify some applicants, and the problems associated with acting on what the claimants say rather than on what they do. Both are potential sources of error.

Yet the statutes do not proscribe all potential sources of error. Categorical rules are mainstays of the legal system, whether in tax law, see *United States v. Boyle*, ___ U.S. ___, 105 S.Ct. 687, 692, 83 L.Ed.2d 622

(1985), or in social welfare programs, see *Heckler v. Campbell*, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983). So is self-reporting. Almost every federal program relies on applicants' answers to questions, and rarely will the agency go behind these answers to see whether the applicant understood the significance of what he said. More often the agency tries to find out whether the applicant answered truthfully, a particular problem in tax and means-tested programs when the applicant has a tendency to share the truth in favor of his financial interests. The IDES, too, rationally could think that a claimant is more likely to overstate the distance he will travel to a job than to understate it.

Categorical rules and self-reporting may be essential to the administration of any large scale program. There are hundreds of decisionmakers within the IDES, and unless

the disposition of an application for EB or FSC benefits is to turn on the identity of the decider, it is necessary to have some fairly simple rules. The Secretary of Health and Human Services uses categorical rules in administering federal disability programs, and the Supreme Court sustained one set of them in *Heckler v. Campbell, supra*. See also *Stephens v. Heckler*, 766 F.2d 284, 285-86 (7th Cir.1985); *Garrison v. Heckler*, 765 F.2d 710, 714 (7th Cir.1985). To coordinate the acts of hundreds of decisionmakers there must be rules; rules must have sharp edges to be effective; all rules with sharp edges also create a risk of error. But the IDES is entitled to decide that these errors are less serious, on balance, than the errors that would be created by the unstructured decisions of hundreds of uncoordinated employees.

The IDES has a particularly difficult task because of the cyclical nature of

unemployment. The EB and FSC programs become important only when there is substantial, extended unemployment. As the number of unemployed people increases, the IDES must hire more employees to process their claims. These employees must be trained quickly -- and they must be trained in several programs, each of which requires difficult decisions. Work search issues are a small fraction of the questions. Did the applicant quit? Was he fired? If he was fired, was that for cause? Did the applicant have enough weeks of covered employment to be eligible? What is the appropriate level of benefits? These and many more confront the staff every two weeks. Unlike programs of disability insurance, in which one decision will establish entitlement for an indefinite period, each decision under the unemployment program fixes eligibility for two weeks at best. Most unemployment comes to an end before benefits

run out. The claimant must seek work continuously. If he is in the minority that does not find work, then every two weeks he submits a new form, and the process begins anew.

From 1980 through 1984 the IDES handled 666,309 claims for EB and 414,534 claims for FSC benefits. These are "new claims;" that is, each claim initiates a process entailing many decisions. (Some people created more than one new claim. A person who received FSC benefits after EB ran out would be two "new claims," and if he then got a job, worked for long enough, and once more became unemployed, he could create "new claims" for EB and FSC in turn.) Every claim requires many decisions, at least one every two weeks. And all this is on top of claims for regular benefits.

Like unemployment, the flow of applications is cyclical. In 1983 there were 136,930 new claims for EB and 231,355 new claims for

FSC benefits. In 1984, however, there were only 110 new claims for EB and 116,263 new claims for FSC benefits. As the number of claims wound down, the IDES reduced the size of its staff. A significant number of the witnesses at trial, once employed by the IDES, had been laid off; the more prosperous the economy, the fewer unemployment claims adjudicators. It is impossible to see how the IDES could have made bi-weekly decisions concerning the 368,000 new claims for extended benefits in 1983 without self-reporting and rules of thumb. Only by accepting the claimant's answers, for example, could an adjudicator proceed with anything like dispatch. If, for example, the adjudicator had to determine the actual travel time between the claimant's home and each place to which the claimant had applied for work, each adjudication would have consumed an inordinate amount of time. Nothing in the

EUC Act, the FSC Act, or the legislative history of either suggests that Congress meant to forbid the use of categorical rules or reliance on claimants' answers.

For completeness I add that categorical rules do not violate 42 U.S.C. § 503(a)(3), on which the plaintiffs also rely. This provision, a portion of the Social Security Act, is applicable to unemployment cases by reference in the EUC Act and the FSC Act. It assures a fair hearing, but this is a matter of procedure rather than of the substantive content of the rules. See *Ross v. Horn*, 598 F.2d 1312, 1318 n. 4 (3d Cir.-1979), *cert. denied*, 448 U.S. 906, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980). Claimants are entitled to two oral hearings, one before the adjudicator and the other before the referee. The second, a de novo inquiry, is recorded and if necessary transcribed. Interpreters are provided if they are necessary. The

Supreme Court has allowed other claims subject to this statute to be adjudicated largely on paper, see *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971), and the IDES's procedures are more than sufficient.

III

The constitutional arguments are almost the reverse of the statutory claims. The plaintiffs maintain that Illinois does not have ascertainable standards for the award of benefits. I take this not as a claim that the state lacks standards -- after all, the plaintiffs complain loudly about the standards the state uses -- but as a claim that the applicants do not have adequate information about the standards. Plaintiffs think that the state should establish a work search plan for each applicant and then simply determine whether the applicant did what he was supposed

to do. This would make it unnecessary for applicants to be concerned about the legal principles underlying the definition of an acceptable plan.

The plaintiffs may well be right that Illinois should implement this approach as a matter of wise administration, but the Constitution does not require it. The due process clause of the fourteenth amendment, on which plaintiffs rely, certainly does not require the state to inform its residents of all rules of law that may be applicable to them. Even in criminal law, to which the ex post facto and cruel and unusual punishments clauses apply, a state may insist that residents take the initiative in learning and following the law. See *Rose v. Locke*, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975); but cf. *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 83 L.Ed.2d 758 (1962). A state may not have a body of secret law, see *Carey*

v. *Quern*, 588 F.2d 230, 232 (7th Cir.1978), but the rules IDES uses are not secret. The Board's opinions are digested, and anyone may consult the opinions of the Board and the state courts that sit in review of the Board's decisions. The most the plaintiffs can say is that the rules Illinois uses are complex and shifting. Part of the system of rules is mechanical (the one requiring work contacts at least three days per week, with a minimum of five contacts per week), and part is flexible (the one requiring contacts to be in person unless the customary way of searching for jobs in the occupation is another method).

The state does not give each applicant a compendium of rules, but neither does the state inform each citizen exactly what he must do to avoid being held liable for torts or breaches of contract. Uncertainty is an attribute of any common law system. The bar

synthesizes and transmits to those affected the important features of the legal system. No one knows the exact meaning of "negligence;" often a judicial decision many years after the fact will surprise people who relied on earlier cases. Illinois has adopted a system with some of the features of the common law for determining what is an adequate search for work. Any such system takes some people by surprise. The Supreme Court had held, nevertheless, that administrative agencies may use adjudication rather than rulemaking to adopt and alter their rules of decision. *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 49 L.Ed.2d 429 (1974); *NLRB v. Bell Aerospace*, 416 U.S,. 267, 294, 94 S.Ct. 1757, 1771, 40 L.Ed.2d 132 (1974); *CSC v. Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2280, 37 L.Ed.2d 796 (1973). See also, e.g., *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610 (7th Cir.1983) (en banc). A system of adjudication implies less than

perfect notice -- and it puts on the applicant the onus of compliance. Social welfare systems may do this, however, and if the applicant cannot show his entitlement to benefits he may be excluded. *Lavine v. Milne*, 424 U.S. 477, 96 S.Ct. 1010, 47 L.Ed.2d 249 (1976); *Dozier v. Loop College*, 776 F.2d 752 (7th Cir.1985).

The plaintiffs rely heavily on *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), and the many other cases that require states to give a person notice of the charges against him before they may cut off welfare, disability, and related benefits. Everyone is entitled to know what he has supposedly done wrong, for otherwise he cannot make an intelligent presentation at a hearing. This does not imply, however, that the state must give all applicants a comprehensive notice of the requirements of the program. Again consider the criminal law.

A person must receive an indictment or information before being tried, but this does not imply that the state must give everyone a copy of the criminal code (and the judicial decisions in interpreting it) before he commits a crime. Quite the contrary, judicial opinions may by themselves be sufficient notice of the effect of a law. *Rose v. Locke, supra*.

Illinois has not left applicants in the dark, however. It both furnishes written notices of the general requirements of the program and supplies oral explanations of the notices. The written notices explicitly warn applicants to expand their search for work and to take any "suitable" work -- which the notices define as any work paying more than the minimum wage (or the level of unemployment benefits) within the claimants' physical and mental abilities. The FSC notice explicitly sets out the rule requiring five contacts per

week. The EB notice does not, but this does not make it defective. It too suggests a great expansion of search. A diligent claimant does something every day to find work. Even one contact a day will produce compliance. The claimant questionnaire has ten lines to be filled in with job contacts, implying that the IDES wants at least that number for each two weeks. Indeed, given the explicit demand for a thorough search, most claimants should be surprised to find that five contacts a week spread over three days would suffice. Neither notice demands that contacts be "personal," but the decisionmakers testified that this was required only in occupations that traditionally hire by personal application.

The notices contain enough to let the claimants know that they had to make their applications reasonably effective -- that is, they had to apply in the way people are hired

for the kind of work people without seniority are assigned to do. This should be plain enough to an unemployed person -- especially one told by the notice that "suitable" work means *any* work -- without a level of detail that might have made the forms even more difficult to comprehend than they are. Those who did not get the picture from the notices could have asked the claims technicians; the technicians who testified said that they answered questions asked of them, and some said that they volunteered information beyond that on the notices.

The notice given to those whose benefits are in jeopardy of termination is governed by *Goldberg*, but the IDES uses a form that is supposed to be filled out with a statement of reasons. I found in Part I that this is not always done. One witness even testified that he was instructed by his superior to omit details in order to complete more notices per

day. I do not believe, however, that this is a ground for the sort of injunction the plaintiffs seek.

First, isolated errors are best dealt with through the administrative tribunals that are in place. An injunction forbidding error in the administration of a social welfare program is not a very useful injunction; error will be with us always. Notice is *already* required. An injunction would not change the governing rule. An injunction may correct a systematic refusal to follow statutory or constitutional commands, but the misguided directives of particular supervisors in some local offices of a large bureaucracy do not require this sort of relief, even if some individual notices do not meet constitutional standards. Every system of hearings misfires, and it may misfire frequently. The reversal rate in the social security disability system is quite striking, see *Mathews v. Eldridge*,

supra, 424 U.S. at 346, 96 S.Ct. at 908, yet the system is nonetheless constitutional.

Second, a claimant in Illinois gets two oral hearings, and the deficient notices affect only the first. Even if the claimant does not know why he has been summoned to meet the claims adjudicator, the adjudicator renders a written decision that provides notice of the deficiencies, and the claimant may use this notice in preparing for a hearing before the referee. The referee's hearing is de novo, so the claimant suffers no prejudice; indeed, a dry run before the claims adjudicator may be an excellent form of notice. The two stages of hearings may produce delay, and delay is to be avoided in unemployment cases. *California v. Java*, 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1971). The plaintiffs did not introduce data on the average delay between the adjudicator's and the referee's hearings, however, and few

claimants' cases reach this stage. Most misunderstandings, even those produced by inadequate notices, are cleared up by the adjudicators, who allow claimants to obtain additional evidence from home if the brief notice impaired their ability to present a case. I therefore conclude that the Illinois system does not produce unacceptable delay. See also *Lavine v. Milne, supra*.

The last two constitutional arguments require little discussion. The plaintiffs say that the rules the IDES uses are not rationally related to the purposes of a requirement that claimants actively seek work. The discussion so far in this opinion is sufficient to demonstrate that they are. The plaintiffs also insist that the notices to IDES uses are defective because they are in English, while some people speak other languages (Spanish and Polish were mentioned most often at trial).

Other courts have held that neither the constitution nor the pertinent statute requires notice in any language other than English. *Carmona v. Sheffield*, 475 F.2d 738 (7th Cir.1973); *Hernandez v. Department of Labor*, 83 Ill.2d 512, 48 Ill.Dec.232, 4167 N.E.2d 263 (1981). I need not reach the abstract question, however, because the evidence does not demonstrate that any claimant failed to receive effective notice. No claimant testified, and therefore none said that the failed to receive benefits because he did not understand the notice. Claims technicians testified that they gave advice to applicants in whatever language the applicants preferred to speak. Offices of the IDES evidently have employees who speak all of the languages preferred by people who use those offices. The record contains evidence of multi-lingual claims technicians and adjudicators, and the use of interpreters

by referees; no one testified that at any office of the IDES there are not enough employees who speak languages other than English.

Indeed, there is not even evidence that a significant number of applicants do not understand English. One claims technician testified that at Local Office 9 she spoke Spanish with 90% of the people who came to her and Polish with another 5%, but she also said that she used whatever language the claimant preferred to speak; she did not try to determine whether particular people were unable to understand English. There was also evidently a selection bias -- others in the office sent to this witness claimants who preferred to speak Spanish. Altogether, then, I find that the plaintiffs have not established that any applicant for benefits failed to receive effective notice of the requirements of the EB and FSC programs because of

language difficulties. This makes further pursuit of the constitutional question unnecessary. (To the extent the language claim is based on GAL 21-81, which says that written notices "should" be made available in languages other than English, it fails not only because GAL 21-81 does not create legal rights enforceable by claimants but also because this passage is hortatory at best.)

IV

My rejection of the regulatory, statutory and constitutional arguments does not imply that Illinois should receive a medal for it administration of the statutes. The record is full of slipshod performances by employees of the IDES. Supervisory employees of the IDES testified that many claims were handled poorly and disagreed with the reasons given by adjudicators and referees. The failure of the IDES to write clearer and more complete notices, and to have them available in Spanish

and Polish, is baffling. The state has not explained why it could not better coordinate the work of the Job Service and the unemployment offices -- though since I ended the trial before the state put on any evidence, I can hardly blame it for a shortfall of explanation.

The state has no interest in denying benefits to eligible people. The incentive cuts the other way -- because EB is 50% and FSC 100% federal finding, the Department of Labor has been worried that states will be too enthusiastic in handing out federal money. This is a principal reason why I have held that GAL 21-81 does not create rights in favor of claimants. The state has no reason to be stingy; administrators of the EB and FSC programs do not need a court to egg them on to greater generosity; that incentive is built in; there are here no discrete and insular minorities in need of help. Why the state

has chosen to be so tight-fisted with someone else's money is hard to fathom. It is entitled to be stingy, however. The plaintiffs' remedies lie in administrative and judicial correction of mistakes in particular cases and political correction of the general approach the IDES has taken.

The clerk will enter judgment for the defendants.